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**In the Supreme Court of the United States**

**OCTOBER TERM, 1940**

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**No. 387**

**PHELPS DODGE CORPORATION, PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

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**No. 641**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**PHELPS DODGE CORPORATION**

---

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**OPINIONS BELOW**

The opinion of the court below (R. 923-929) is reported in 113 F. (2d) 202. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 837-919) are not yet reported in permanent form but are available in advance sheet form, 19 N. L. R. B., No. 60.

## JURISDICTION

The decree of the court below (R. 930-933) was entered on July 26, 1940. The Company's petition for a writ of certiorari, No. 387, was filed on August 30, 1940. The Board's petition for a writ of certiorari, No. 641, was filed on December 21, 1940. Both were granted on January 13, 1941.<sup>1</sup> The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether a refusal to hire applicants for employment, because of their union membership and activity, violates Section 8 (3) and (1) of the National Labor Relations Act.

2. Whether there is substantial evidence supporting the Board's findings (a) that a labor dispute in which the Company was engaged was current when the Act took effect and for a period thereafter, and (b) that during this period the Company refused to reinstate certain strikers because of their union activities. (These findings, if sustained, establish a violation of Section 8 (3) and (1) of the Act even if Question 1 be answered in the negative).

<sup>1</sup> On October 18, 1940, an order was signed by a justice of this Court extending the time within which to file the petition in No. 641 for 60 days from October 26, 1940.

3. If Question 1 be answered in the affirmative, whether the Board, upon finding that the applicants would have been employed but for their union membership and activity, may, under Section 10 (c) of the Act, require that they be employed with back pay.

4. Whether under Section 10 (c) the Board may order the employment or reinstatement of persons who were discriminated against in violation of Section 8 (3) and (1), but who thereafter obtained "other regular and substantially equivalent employment" within the meaning of Section 2 (3) of the Act.

5. Whether Section 10 (c) prohibits an award of back pay independently of reinstatement.

6. Whether the Board, in making a back-pay award, is required to provide for the deduction of amounts which the recipient could have earned, but did not.

7. Whether the Board's back-pay order is arbitrary or excessive because of the substantial lapse of time between the commission of the unfair labor practices and the issuance of the Board's decision.

#### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

#### STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order

(R. 837-919). The Board's findings may be briefly summarized as follows:<sup>\*</sup>

Phelps Dodge Corporation, herein called the Company, is a large producer of copper ore and is extensively engaged in interstate commerce (R. 840-843).

On June 10, 1935, the International Union of Mine, Mill and Smelter Workers, Local No. 30, a labor organization herein called the Union, called a strike and began to picket the Company's mine because the Company had discharged some of its members (R. 844-845). The strike and picketing continued until August 24, 1935, when the Union voted to terminate the strike and disbanded the picket line (R. 845, 848).

Although the strike at first caused a curtailment of production, by June 28 the Company had succeeded in replacing all the strikers and had resumed normal productive operations (R. 845). Subsequently, between August 9 and the termination of the strike on August 24, and at various times thereafter up until the time of the hearing in January 1938, the Company hired some 2,250 additional employees (R. 859, 860, 863). During this extensive hiring the Company consistently refused to take back any of the strikers, because of their strike and union activities, although the strikers applied for reinstatement on three separate occa-

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<sup>\*</sup> The evidence supporting those of the findings which are challenged is discussed in the Argument.

sions between August 9 and August 24 (R. 845-848, 850-852, 855-856), and practically all of them individually applied thereafter (R. 845, 852-856, 861, 864, 870-905).

The Company likewise refused, because of their membership and activity in the Union, to hire Vernon Dell Curtis and William Daugherty, who had previously worked for the Company but whose employment had terminated prior to the strike (R. 868-870, 906). The Board found that, absent discrimination, the Company would have taken back Curtis and the 38 strikers named in the Board's order by January 1, 1936, and would have hired Daugherty by January 30, 1937 (R. 860-861, 912-914).

Upon these findings, the Board concluded that the 38 strikers ceased work as a consequence of and in connection with a labor dispute which was "current" when the Act became effective on July 5, 1935, that they therefore remained "employees" of the Company under Section 2 (3) of the Act, and that the Company's discriminatory refusal to reinstate the strikers, or to consider them for reinstatement, violated Section 8 (3) and (1) of the Act (R. 862-864). The Board further held, in the alternative, that even if the strikers had ceased to be the Company's "employees" at the time of the discrimination against them, the denial of employment to them, as well as to Curtis and Daugherty, constituted "discrimination in regard to hire" within the meaning of Section 8 (3) (R. 864-865).

Prior to the hearing, 21 of the 38 strikers (R. 932) obtained employment with Shattuck Denn Mining Company; the Board found that neither these strikers (R. 870-871, 909) nor any of the other strikers (R. 867-868, 877-880, 882-883, 889-904, 909) obtained "other regular and substantially equivalent employment" within the meaning of Section 2 (3). The Board also concluded, in the alternative, that if any of the strikers had obtained such employment, it would nevertheless order their reinstatement in order to effectuate the policies of the Act (R. 909).

The Board's order required the Company to cease and desist from its unfair labor practices; to offer reinstatement<sup>3</sup> with back pay to Curtis, Daugherty, and 37 of the 38 strikers; to make whole the remaining striker for any loss of wages suffered by him up to the time when he became unemployed; to reimburse governmental agencies for work-relief payments to the 40 men; and to post notices (R. 915-919).

Thereafter, the Company filed a petition in the court below to review and set aside the Board's order (R. i-viii). The Board answered, requesting enforcement of its order (R. xi-xvii).

The court sustained the Board's findings and order except in the following respects (R. 923-929):

<sup>3</sup> It is clear that in using the term "reinstatement," the Board intended that it be read as encompassing also "reemployment," "instatement," and "employment" (see R. 909-910).

(1) Following its earlier decision in *National Labor Relations Board v. National Casket Co.*, 107 F. (2d) 992, the court held that while Curtis and Daugherty were denied employment because of their union affiliations, discrimination against applicants for employment does not violate Section 8 (3) or (1) of the Act (R. 928-929); (2) it held that the Board was without power to order the reinstatement of persons who, after suffering discrimination while "employees" of the Company, obtained other regular and substantially equivalent employment, and that the findings that the strikers employed at Shattuck Denn did not obtain such employment were not supported by the evidence (R. 927); (3) it held that in computing the amount of back pay awarded to each individual, there must be deducted the amount which he "failed without excuse to earn" (R. 928, 931-932).<sup>5</sup> Judge

<sup>4</sup> The court remanded the case to the Board for the ad-  
 ducing of additional evidence concerning the equivalence  
 of employment at Shattuck Denn (R. 927). The Board has  
 not sought review of the holding that the findings of non-  
 equivalence were unsupported (Pet. in No. 641, p. 8, n. 6).  
 In the view we take, the Board had the power, which it  
 exercised alternatively in this case (*supra*, p. 5), to order  
 the reinstatement of the strikers whether or not they had  
 obtained equivalent employment. If this view is correct, the  
 reinstatement order is valid regardless of whether the findings  
 as to substantially equivalent employment are supported by  
 the evidence, and the remand is therefore erroneous and should  
 be reversed.

<sup>5</sup> In addition to the modifications above noted, the court  
 also eliminated the provision for reimbursement of govern-  
 mental relief agencies, and, on request of the Board, modi-

violates Section 8 (1) by interfering with the self-organization both of the applicants and of those already employed in the plant, to whom the discrimination sounds an open warning of their employer's hostility to unions.

The legislative history of the Act makes it clear that Section 8 (3) means precisely what it says, and was intended to prohibit discrimination in the selection among applicants for employment. Persuasive also is the background of the Act; the practice of blacklisting union men had been a common and notorious means of destroying union organization for many years, and it is scarcely conceivable that Congress, in enacting comprehensive legislation designed to safeguard the rights of self-organization and collective bargaining, intended to leave untouched the means by which the blacklist is made effective.

The apprehension of the court below that the construction for which we contend would compel an employer to hire a union man in preference to a non-union man or *vice-versa* wholly misconceives the position of the Board; the Act does nothing more than rule out membership or non-membership in a union as a permissible criterion of selection, leaving the employer entirely free to use whatever other criteria he would normally utilize.

#### B

Even if Section 8 (3) is interpreted so as not to prohibit discrimination against applicants for

employment, the Company nevertheless violated the section with reference to the strikers. The evidence supports the Board's findings (1) that the labor dispute in connection with which the men ceased work was current on July 5, 1935, and until August 24, 1935, so that during that period the strikers possessed the status of striking "employees" under Section 2 (3); and (2) that the strikers were refused reinstatement prior to August 24 because of their union activities.

## II

The order directing the Company to employ or to reinstate, with back pay, the men discriminated against, may validly be grounded on the discrimination against them as applicants for employment. Even if not thus supportable, the order is nevertheless valid as to the strikers on the basis of the discrimination against them as striking "employees." Nor is the order invalid as to those strikers who obtained "other substantially equivalent employment," within Section 2 (3), subsequent to the discrimination against them.

## A

The order requiring employment of the illegally rejected applicants with back pay is valid as an exercise of the Board's power to require "such affirmative action \* \* \* as will effectuate the policies of this Act." It is apparent that no other form of relief is effective to remedy the Company's unfair labor practices.

Power to direct this appropriate relief has not been denied to the Board by the inclusion in Section 10 (c) of the phrase "including reinstatement of employees with or without back pay". Both the form of expression in the statute and the legislative history demonstrate that the phrase is merely illustrative of the type of relief which the Board may direct, and that it does not limit in any way the Board's broad power to direct "such affirmative action \* \* \* as will effectuate the policies of this Act." Compare *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

If our argument is rejected and the phrase "reinstatement of employees with or without back pay" is held to be restrictive, not illustrative, it does not follow that the term "employees" as there used comprehends only those in a proximate employment relation with the particular employer against whom the order is directed. The Act and its legislative history cogently indicate that, except for purposes of Sections 8 (5) and 9 (a) (the collective bargaining provisions), the term "employees" is used throughout the statute, including Section 10 (c), in its generic sense, as meaning members of the working class generally. Thus, the restriction assertedly imposed by the phrase "including reinstatement of employees" upon the Board's power to direct appropriate affirmative relief is in fact no restriction at all. These complexities of construction confirm our primary view that the phrase was

in no way intended to limit the Board's authority under Section 10 (c) to direct whatever affirmative action is appropriate "to effectuate the policies of this Act."

## B

The reinstatement order should be upheld as a remedy for the discrimination against the strikers as "employees" even if the Court rejects our contention that the discrimination against the strikers as applicants for employment constitutes an unfair labor practice upon which the order may be validly grounded. As to those of the strikers who did not, after the discrimination against them, obtain "any other regular and substantially equivalent employment" within the meaning of Section 2 (3), the Board's order is clearly an appropriate exercise of its power to require the "reinstatement of employees with or without back pay". *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333.

## C

The holding below that those of the men who may have obtained such equivalent employment are beyond the Board's reinstatement power rejects the generic meaning of the term "employees" as used in Section 10 (c) and is based upon the restrictive construction of that section which limits the Board's power to the "reinstatement of employees".

The Board could find that reinstatement of the workers, whether or not they obtained equivalent

employment, constituted "such affirmative action \* \* \* as will effectuate the policies of this Act."

It is reasonable to suppose that the deeply coercive effects of wholesale elimination of all union employees can be dissipated only by a demonstration that the Act carries sufficient force to restore to their jobs those who have been penalized for exercising the rights which it guarantees.

### III

The court below modified the back-pay order to provide that there be deducted, in the case of each individual, the amount which he "failed without excuse to earn." But the common law doctrine of mitigation of damages has no application in the public proceedings under the Act, and to read it into the Act is to deny to the Board power to make the employees whole.

Further, the modification would cast upon the Board an impossible administrative burden. To require it to launch speculative and time-consuming inquiries into all available employment opportunities and the adequacy of each individual's efforts to support himself would impair the carrying on of the Board's functions. The difficulties of the inquiry far outweigh the presumed necessity for it. Workingmen rarely have sufficient means to sit idly by in the hope of eventual reimbursement; they are compelled by economic circumstances to seek other means of livelihood.

## IV

The back-pay order is not "excessive and arbitrary," as the Company contends. While there was considerable delay both in the filing of charges with the Board by the employees and in decision of the case by the Board, the equities do not support the Company's plea that the loss occasioned by its unfair labor practices should be shifted to the employees. The delay in filing charges occurred while widespread attacks upon the Act's constitutionality and the prevalence of suits to enjoin proceedings under the Act discouraged recourse to the Act by employees. The Board did not at that time proceed in mining cases (compare *Carter v. Carter Coal Co.*, 298 U. S. 238) so that even if charges had been filed promptly in this case, the delays would not have been avoided.

The delay occasioned by the Board's slow handling of the case after charges were filed is in no way attributable to the employees and affords no basis upon which to penalize them. When the Company chose to ignore the trial examiner's recommendations, although it could have stopped the running of back pay by reinstating the strikers pending the outcome of the case, it assumed the risk of accumulating liability while the litigation ran the course dictated by the whole of the Board's work. That that course was tedious was due to no fault of the Board or the employees, but to the

adventitious circumstance of a tremendous influx of cases after the Act had been sustained by this Court.

## ARGUMENT

### I

THE COMPANY VIOLATED SECTION 8 (3) AND (1) OF THE ACT WITH RESPECT TO THE STRIKERS AND WITH RESPECT TO CURTIS AND DAUGHERTY, THE TWO APPLICANTS FOR EMPLOYMENT

The Board's conclusion that the Company violated Section 8 (3) and (1) of the Act with respect to the strikers was based upon alternative holdings. Primarily, the Board found (R. 862-864) that the labor dispute in connection with which the strikers ceased work was current on the effective date of the Act, July 5, 1935, and remained current until August 24, 1935, so that at the time of the discriminatory refusal on and after August 9 to consider the strikers for reinstatement they had the status of striking employees under Section 2 (3) of the Act. In the alternative, the Board found (R. 864-865) that if the strikers did not have that status the denial of employment to them on account of union membership and activities nevertheless constituted "discrimination in regard to hire" violative of Section 8 (3). The question whether discrimination in the selection among applicants for employment violates the Act is also presented by the cases of Curtis and Daugherty, who were con-

cededly merely applicants, and who, the Board found (R. 868-870, 906), were refused jobs because of their union membership and activities.\*

While the Company contests the factual bases of the Board's primary holding with respect to the strikers, that is, the findings that the labor dispute was current on July 5 and until August 24 and that the strikers were discriminated against during this period, it concedes (Pet. in No. 387, pp. 3, 10) that there is substantial evidence to support the finding that it discriminated against the strikers as applicants for employment after August 24, 1935; it contends however, that such discrimination does not violate the Act. The same contention is advanced as to Curtis and Daugherty; in their cases, too, the Company maintains that such discrimination is not contrary to the prohibitions of the Act. The court below agreed with this view, and set aside the order as to Curtis and Daugherty (R. 928-929), although it upheld the Board's findings of unfair labor practices as to the strikers on the first basis assigned by the Board, i. e., that the labor dispute was still current and therefore they were striking employees under Section 2 (3) at the time they suffered discrimination (R. 925-927).

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\* These two men had previously worked for the Company, but had ceased to do so in 1934 (R. 247, 279). Both joined the Union prior to the strike, Curtis picketed, and both, upon application subsequent to the strike, were denied employment (R. 248-250, 280-281, 527, 868-870, 906).

Since consideration of the factual issues pressed by the Company as to the strikers is obviated if, as we contend, discrimination against applicants for employment violates the Act, we shall consider that question first. Secondly, we shall argue that even if it be held that discrimination against applicants for employment does not violate the Act, the Board and the court below correctly held that the Company did illegally discriminate against the strikers as "employees" within the meaning of the Act.

A. BY DISCRIMINATING AGAINST APPLICANTS FOR EMPLOYMENT,  
THE COMPANY VIOLATED THE ACT

It is the Government's position that Section 8 (3) and (1) of the Act makes it an unfair labor practice to discriminate on the basis of union membership or activities in the selection among applicants for hire. In rejecting this construction the court below followed its earlier decision in *National Labor Relations Board v. National Casket Co.*, 107 F. (2d) 992. The opposite conclusion was reached and the construction given the Act by the Board was sustained by the Circuit Court of Appeals for the First Circuit in *National Labor Relations Board v. Waumbec Mills*, 114 F. (2d) 226, in an able opinion by Judge Magruder.<sup>7</sup> We sub-

<sup>7</sup> Law review discussion uniformly supports the Board's position. 53 Harv. L. R. 141; 37 Mich. L. R. 141; 49 Yale L. J. 953; 35 Ill. L. R. 585; 14 Wis. L. R. 445; 19 North Car. L. R. 240; 9 Geo. Wash. L. R. 362; 19 Boston Univ. L. R. 680; 28 Georgetown L. J. 1003; 18 N. Y. U. Law Quart. Rev. 266; 8 Univ. of Chicago L. R. 149.

mit that the construction of the Act adopted by the court below does violence to the plain terms of Section 8 (3) and disregards the intent of Congress as further shown by the legislative history, purposes, and background of the statute.

Section 8 (3) provides that it is an unfair labor practice for an employer

By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization \* \* \*

Unless the prohibition against "discrimination in regard to hire" is interpreted as proscribing discrimination in selecting applicants for employment, the words used by Congress are deprived of their "natural meaning." The *Waumbec Mills* case, 114 F. (2d) at 233.

Further, by refusing employment to an applicant because of his union membership or activity, the employer imposes a discriminatory "condition of employment" which discourages union membership. This Court has held that the conditioning of an applicant's employment upon his father's joining a labor organization is "a violation of § 8 (3) of the Act in absence of a valid closed-shop agreement". *National Labor Relations Board v. Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941.

A discriminatory denial of employment also violates Section 8 (1) of the Act, in that it interferes

with, restrains, and coerces employees in the exercise of the rights guaranteed by Section 7. A discriminatory refusal to hire, by sounding an open warning of the employer's hostility to the union, plainly interferes with the self-organization of those already employed. Added to the threat normally implicit in such hostility is the knowledge that their present union activity may lawfully constitute a bar to their future employment. " \* \* \* surely it tends to 'discourage membership in any labor organization' to know that a record of union agitation will prevent one from getting back one's old job." L. Hand, J., dissenting in the *National Casket* case, 107 F. (2d) at 999. And see the *Waumbec Mills* case, 114 F. (2d) at 233. Moreover, the applicant himself may well be an "employee" within the meaning of Section 8 (1), although there is no employment relation subsisting between him and the particular employer who engages in the discrimination. See *infra*, pp. 44-49.

The legislative history of the Act buttresses the conclusion that Congress meant precisely what the language of Section 8 (3) clearly states. The House Committee on Labor stated that that section

...pells out in greater detail the provisions of section 7 (a) prohibiting "yellow-dog" contracts and interference with self-organization. This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion or transfer, hire, forced resignation, or

division of work; in reinstatement or *hire* following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant.

Nothing in this subsection prohibits interference with the normal exercise of the right of employers to *select* their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in *hire* or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination. [H. Rept. No. 1147, 74th Cong., 1st Sess., p. 19; italics supplied.] \*

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\* See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 11. The House Committee's use of the word "hire" in its usual sense disposes of the suggestion by the court below in the *National Casket* case that "In the connection in which it is used 'hire' may well be a noun meaning wages \* \* \*" (107 F. (2d) at 997). Moreover, "hire" in the latter sense is plainly included in the prohibition against discrimination in regard to "any term \* \* \* of employment".

The Senate committee report recommending passage of a similar bill introduced by Senator Wagner in the previous year, 1934, is further evidence that Congress used the word "hire" to mean the act of hiring. That bill (S. 2926, 73 Cong. Rec. 3444, 73d Cong., 2d Sess.) provided:

"SEC. 5. It shall be an unfair labor practice for an employer \* \* \*:

"(6) To engage in any discriminatory practice as to wage or hour differentials, advancement, demotion, hire, tenure of employment, reinstatement, or any other condition of

And in piloting the bill through the Senate, Senator Walsh, chairman of the Senate Committee, stated, in answer to a question as to the operation of the proviso to Section 8 (3):<sup>9</sup>

All this bill says is that *no employer may discriminate in hiring a man, whether he belongs to a union or not, and without regard to what union he belongs*; but if an employer wishes to agree and to make a contract of his own volition with his employees to hire only members of a company union or of a trade union, he can do so. [79 Cong. Rec. 7674; italics supplied.]

Similarly, Representative Truax, a member of the House Committee, stated:

An obnoxious form of interference is the discrimination displayed in hiring employees and the tenure of employment based upon the employees' affiliation with labor organizations that are distasteful to the employer. [79 Cong. Rec. 9717.]

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employment which encourages membership or nonmembership in any labor organization."

In reporting this bill, which was clearly the antecedent of the present Act, the Senate Committee stated:

"An employer, of course, need not hire an incompetent man \* \* \*. But if the right to join or not to join a labor organization is to have any real meaning for an employee, the employer ought not to be free \* \* \* to refuse to hire him merely because of his membership in an organization" (S. Rept. No. 1184, 73d Cong., 2d Sess., p. 6).

<sup>9</sup> That proviso permits closed-shop contracts under carefully defined circumstances. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 75.

The background and purposes of the Act afford further confirmation of the legislative intent. The Act was intended to encourage collective bargaining by guaranteeing the right of self-organization free from employer interference (Section 1). Reports of official investigations and writings of authorities in the field of labor relations establish that the refusal to hire union workers, a policy usually made effective by the use of some form of union blacklist, has for many years been one of the most common and effective weapons wielded by employers determined to suppress union activity.<sup>10</sup>

<sup>10</sup> See e. g., *Final Report of the Industrial Commission* (1902), Vol. XIX, pp. 82-83; U. S. Anthracite Coal Strike Commission, *Report to the President on the Anthracite Coal Strike of May-October, 1902* (1902), p. 78; Fitch in *Encyclopedia of the Social Sciences* (1935), Vol. II, pp. 578-579; Federal Council of Churches of Christ, *Report on the Industrial Situation at Muscatine, Iowa* (1912); Eaidler, *Boycotts and the Labor Movement* (1913), pp. 39-40; United States Commission on Industrial Relations, *Final Report* (U. S. Senate, 64th Cong., 1st Sess., Document No. 415, 1916), Vol. I, p. 118; The Interchurch World Movement, Commission of Inquiry, *Report on the Steel Strike of 1919* (1920), p. 219; New York State Joint Legislative Committee on Housing, *Intermediate Report* (Legislative Document No. 60 (1922), p. 128; Clarence E. Bonnett, "The National Founders' Association" from *Employers' Associations in the United States* (1922), p. 80; Gulick, *Labor Policy of the United States Steel Corporation* (1924), pp. 125-127; Commons and Associates, *History of Labour in the United States* (1926), Vol. I, pp. 362-363, 420-422; Lescobier and Brandeis, *History of Labor in the United States* (1896-1932), Vol. III, pp. 298, 299; Daugherty, *Labor Problems in American Industry* (1938), pp. 389-390; Cummins, *The Labor Problem in the United States* (Second

The blacklist directs an even more serious and effective thrust at the worker's livelihood than does the weapon of discharge; it follows him about when he tries, of necessity, to obtain employment with other employers, perhaps far removed from the scene of his prior work and union activity. A subcommittee of the Senate Committee on Education and Labor (S. Rept. No. 46, 75th Cong., 1st Sess., 1937, p. 8), has described the blacklist as "being probably of all penalties the most ruthless device, since it is intended to produce, and often does produce, permanent loss of livelihood. \* \* \* a blacklisted person may be almost universally barred from working at his given trade."<sup>11</sup> The practice of refusing to hire union members or sympathizers was probably even more widespread than the discharge of union members:<sup>12</sup> the blacklist, in combination with the yellow-dog contract, enabled

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Edition, 1935), p. 351. See, also, Brooks, *When Labor Organizes* (1937), pp. 81-83; U. S. Bureau of Labor, *Investigation of Western Union and Postal Telegraph-Cable Companies* (Senate Doc. No. 725, 60th Cong., 2d Sess., 1909), pp. 39, 41.

<sup>11</sup> "Effectively blacklisting a worker is to commit economic homicide, for the worker who is blacklisted has little opportunity to get a job in the industry for which he is trained." MacDonald, *Labor Problems and the American Scene* (1938), p. 605.

<sup>12</sup> Clark and Simon, *The Labor Movement in America* (1938), pp. 83-84; Daugherty, *Labor Problems in American Industry* (1938), pp. 650-652; United States Commission on Industrial Relations, *Final Report* (U. S. Senate, 64th Cong., 1st Sess., Document No. 415, 1916), Vol. I, p. 18.

an employer to keep his plant entirely free from union members, since he could both refuse to employ union men and could enjoin union organizers from enticing breach of the non-union employment contracts required of employees. *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229. Unquestionably knowledge on the part of employees that they might be blacklisted from future employment operated as a powerful deterrent against union membership.

It is no historical accident, then, that when Congress first sought to protect the right of workers to organize, in the Erdman Act of 1898 (30 Stat. 424), it struck at the union blacklist as well as at discriminatory discharge and the yellow-dog contract. Widespread recognition of the evil is also attested by the fact that some 25 states have at one time or another enacted legislation forbidding blacklisting.<sup>13</sup> Legislative attempts to wipe out blacklisting were rendered largely futile, however, by the decision in *Adair v. United States*, 208 U. S. 161 (1908), holding unconstitutional the provision of the Erdman Act prohibiting the discharge of employees because of union membership. See also *Coppage v. Kansas*, 236 U. S. 1. Legislation forbidding blacklisting was bound to be ineffective. "so long as employers were free to discharge or

<sup>13</sup> These statutes are analyzed in Witte, *The Government in Labor Disputes* (1932), pp. 213-218, and in Oakes, *Organized Labor and Industrial Conflicts* (1927), pp. 741-754. See also Note (1937) 37 Columbia L. Rev. 816, 819-820.

refuse to employ any workman who belonged to a union." Commons and Andrews, *Principles of Labor Legislation* (4th Rev. Ed., 1936), p. 408.<sup>14</sup> The obstructive effect of the *Adair* and *Coppage* cases was at last removed in 1930, when this Court, in sustaining the Railway Labor Act of 1926, held that a district court might properly require the reinstatement of persons discriminatorily discharged. *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548.

In the light of this background it is scarcely conceivable that when Congress enacted comprehensive legislation designed to safeguard the rights of self-organization and collective bargaining, it did not intend to prohibit discrimination on the basis of union membership in the selection of employees, a common practice notoriously effective to destroy self-organization. "If employers are free to pursue a policy of blacklisting applicants with labor union records, then the other prohibitions of the Act are of little worth." The *Waumbec Mills* case, 114 F. (2d) at 233.

Further, it is conceded even by the court below (*National Casket* case, 107 F. (2d) at 997; see also the *Link-Belt* case, *supra*, p. 19), that an offer of employment on condition that the applicant will not join a union, is a violation of Section 8 (3) as


<sup>14</sup> Other authorities are in full accord: Witte, *The Government in Labor Disputes* (1932), pp. 217-218; Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 Harv. L. Rev. 1071, 1083-1084.

a "discrimination in regard to \* \* \* any term or condition of employment". And, as pointed out by Judge Magruder in the *Waumbec Mills* case, 114 F. (2d) at 233, "It would be a most extraordinary result if the Act prohibits this milder conduct by an employer and yet permits him to deny employment unconditionally because of an applicant's former union activity."

Moreover, as this Court has recognized (*H. J. Heinz Co. v. National Labor Relations Board*, No. 73, this Term, decided January 6, 1941; *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 409-410), in enacting the present Act, Congress had before it and relied upon the administrative practice under the prior legislation likewise designed to protect the rights of employees to self-organization and collective bargaining. H. Rept. No. 1147, 74th Cong., 1st Sess., pp. 3, 5, 7, 15-18, 20-22, 24; S. Rept. No. 573, 74th Cong., 1st Sess., pp. 2, 8-9, 13, 16, 17. And the first National Labor Relations Board, created to administer Section 7 (a) of the National Industrial Recovery Act apparently drew no distinction between a discriminatory discharge or refusal to reinstate and a discriminatory refusal to employ, but held all such practices forbidden. See, e. g., *Matter of Maujer Parlor Frame Co.*, 1 N. L. R. B. (old) 20; *Matter of Globe Gabbe Corp.*, 2 N. L. R. B. (old), 60; *Matter of Shuster Gaio Corp.*, 2 N. L. R. B. (old) 65.

The court below (the *National Casket* case, 107 F. (2d) at 997) asserted that Section 8 (3) "confers rights upon employees, not upon applicants for employment." On that basis it in effect read out of Section 8 (3) the prohibition against discrimination in regard to hire. Moreover, Section 8 (3) does not state that it is limited to the protection of "employees." And we have already shown that a discriminatory denial of employment to applicants interferes with the self-organization of those already employed (*supra*, pp. 19-20). Cf. *United States Electrical, etc., Workers of America v. International Brotherhood of Electrical Workers*, 115 F. (2d) 488, 491 (C. C. A. 2).

The only other basis offered by the court below (the *National Casket* case, 107 F. (2d) at 997) for a construction of Section 8 (3) which distorts its terms and ignores its history, purposes, and background is the apprehension that under a contrary interpretation there would be an illegal discrimination in hire whenever the employer hired any union man or any nonunion man: Section 8 (3) makes it an unfair labor practice to "encourage" union membership through discrimination in hire as well as to "discourage" it through such discrimination. The court's reasoning can be based only upon an assumption that union affiliation or its absence is the only standard of selection for hire; a similar assumption as to selection for discharge would, if valid, render any dismissal a violation of



the Act. The obvious fallacy lies in a failure to recognize that the Act imposes only a limited restriction upon selection; except where a valid closed shop contract exists, the choice may not be on the basis of the presence or absence of union activities or membership, but may be upon the basis of efficiency, personality, or a host of other permissible standards of selection. See the *Waumbec Mills* case, 114 F. (2d) at 234. In short, the Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. So long as normal, rather than discriminatory, criteria are observed, there is no violation of the Act regardless whether or not the person selected for hire or discharge is a union member.

Finally, it may not be contended that the construction adopted below is necessary to save the constitutionality of Section 8 (3). The proscription of discrimination in hire imposes no restraint on the employer which is qualitatively or quantitatively different from the admittedly valid prohibition against discrimination in discharge. As stated by Judge Learned Hand in his concurring opinion in the court below, "I can see no greater limitation in denying him [the employer] the power to discriminate in hiring, than in discharging" (R. 930). Likewise, the rights of workers intended to be protected by the two restrictions are

identical. In the *Jones & Laughlin* case the Court did not differentiate between the restriction on hiring and that on discharging but considered the constitutionality of the Act upon the assumption that it imposed both upon employers (301 U. S. at 45, 46). See also the *Waumbec Mills* case, 114 F. (2d) at 235-236.

B. THE COMPANY ILLEGALLY DISCRIMINATED AGAINST THE STRIKERS WHILE THEY WERE "EMPLOYEES" WITHIN THE MEANING OF THE ACT

Even if Section 8 (3) is interpreted so as not to prohibit discrimination against applicants for employment, the Board's conclusion that the Company violated that section with reference to the strikers is nevertheless valid. Our argument under Part A, *supra*, concerned the Company's conceded discrimination against the strikers as applicants for employment; the Board likewise found that prior to August 24, 1935, and while the strikers were striking employees under Section 2 (3) of the Act,<sup>15</sup> the Company rejected their applications for reinstatement because of their union membership and activities (*supra*, p. 5). It is not disputed that such discrimination against striking employees violates Section 8 (3) and (1). *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333. The Company's claim is that there is insufficient evidence to support the Board's

<sup>15</sup> Section 2 (3) is set out *infra*, pp. 45, 69.

findings (1) that the labor dispute in connection with which the men ceased work was current on July 5, 1935, and until August 24, 1935, so that during that period the men were striking employees under Section 2 (3); and (2) that the strikers were refused reinstatement prior to August 24, 1935, because of their union activities. We shall consider the validity of these two findings separately.

1. As the court below held (R. 926), the currency of the labor dispute is a question of fact on which the Board's findings are conclusive if supported by substantial evidence. *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 147 (C. C. A. 9), certiorari denied, 304 U. S. 575. The court concurred in the Board's finding (R. 925-927), and we submit that it plainly has the requisite evidentiary support. The strike, called by the Union in protest against discharge of its members, began on June 10, 1935 (R. 100-102, 123-125, 158-159, 164-165, 174, 222-223, 231). (The Act became effective on July 5, 1935.) The strike at first caused a substantial drop in production (R. 663, 583-584). Although by June 28 the Company had replaced all of the strikers by hiring new men and had resumed normal productive operations (R. 530-531, 538, 584-585), the strike activities, including daily picketing of the mine, continued until August 24, when the Union voted to terminate the strike and disbanded the picket line (R. 101, 108, 159, 174-175, 219, 292, 367, 397, 657-659, 669). On August 9 and again on August 23 the Company

conferred with representatives of the Union concerning possible settlement of the strike (R. 106-108, 650-655, 657-658). Throughout this period the Company's officials likewise recognized the continued currency of the strike in their communications with each other (R. 648, 650-655, 657-659, 669).

The Company maintains that since it had replaced the strikers and resumed normal productive operations by June 28, the strike terminated at that time under the common law rule. Whether or not this contention is valid,<sup>16</sup> it does not follow that on July 5, the effective date of the Act, no "current labor dispute" within the meaning of Section 2 (3) and (9) of the Act was in progress between the Company and its employees. The term "labor dispute" as defined in the Act,<sup>17</sup> obviously is not co-terminous with "strike."<sup>18</sup> The fundamental

<sup>16</sup> That it is not, see *Restatement of the Law of Torts*, Chap. 38, Sec. 776 (b). Cf. Note, 84 Univ. of Pennsylvania Law Rev., pp. 771-779.

<sup>17</sup> Section 2 (9): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

<sup>18</sup> This is clear, were it otherwise doubtful, from the decisions construing the Norris-La Guardia Act and state anti-injunction acts containing substantially the same definition of "labor dispute" as does the National Labor Relations Act. See e. g., *Milk Wagon Drivers' Union v. Lake Valley, Inc.*, 311 U. S. 91; *United States v. Hutcheson*, No. 43, this Term, decided February 3, 1941; *New Negro Alliance v. Sanitary*

characteristic of a "labor dispute" is the presence of a "controversy" concerning some or all of the matters enumerated in Section 2 (9); a strike or lockout is merely one manifestation of such a controversy.<sup>19</sup> Given the continuance of disagreement and conflict, the currency of the dispute at any moment cannot be disproved by any single circumstance, but must rest upon an appraisal of all the circumstances. Indeed, in a case where one important subject of disagreement concerns whether, or the manner in which, the strikers are to be permitted to return to work, the labor dispute cannot be said to have terminated until these matters are finally settled.

In the present case, where the strikers continued picketing and otherwise fully persisted in their efforts to have the Company reinstate them and the eight men whose discharge caused the strike, and where the Company itself continued to nego-

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*Grocery Co.*, 303 U. S. 552; *Levering & Garrigues v. Morrin*, 71 F. (2d) 284 (C. C. A. 2), certiorari denied, 293 U. S. 595; *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 400; 268 N. W. 270, 272, affirmed, 301 U. S. 468; *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323; *American Furniture Co. v. Chauffeurs, Teamsters and Helpers Union*, 222 Wis. 338, 268 N. W. 250.

<sup>19</sup> Thus, in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344, this Court held that "Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in § 2 (9) of the Act." The "labor dispute" in that case consisted of a disagreement between the employer and its employees concerning terms of employment.

tiate with representatives of the strikers who were seeking to settle the dispute, it would be unrealistic to hold that there was no labor dispute simply because the Company had filled the jobs. Certainly the Board could properly find that the labor dispute continued.<sup>20</sup>

<sup>20</sup> In *Standard Lime & Stone Co. v. National Labor Relations Board*, 97 F. (2d) 531, 535 (C. C. A. 4), the court, upholding the Board's finding that the labor dispute was current, pointed to "the continued efforts of the strikers" and "their willingness to negotiate," as well as to the fact that the employer had not secured a full complement of employees. See also *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134, 138 (C. C. A. 4), certiorari denied, 302 U. S. 731; *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 145, 147 (C. C. A. 9), certiorari denied, 304 U. S. 575. Compare *National Labor Relations Board v. Good Coal Co.*, 110 F. (2d) 501 (C. C. A. 6), certiorari denied, 310 U. S. 630; *Baillis v. Fuchs*, 283 N. Y. 135, 136. In *McPherson Hotel Co. v. Smith*, 127 N. J. Eq. 167, where the jobs of strikers were filled and normal operations resumed, but the amount of business was still affected by continued picketing, the court held that the strike was not terminated and that even if it was the "labor dispute" nevertheless continued within the meaning of the New Jersey Anti-Injunction Act.

*National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, relied on by the Company (Pet. in No. 387, p. 10), is not in point. In that case the Board found that the employer refused to bargain with the representatives of its striking employees on July 23, 1935, and ordered reinstatement of the strikers as of that date, to the displacement of new employees hired thereafter. In holding that there was no refusal to bargain on July 23, and that the reinstatement order was therefore invalid, the Court pointed out that, while there was a later refusal to negotiate in September, the employer was then "operating with a full complement" of new employees. Since those new em-

Since the labor dispute was current at the time the Act became effective on July 5, 1935, and at the time of the unfair labor practices, the fact that the labor dispute commenced prior to July 5 does not preclude application of the Act. The Circuit Courts of Appeals have uniformly so held<sup>21</sup> and there is no indication either in the Act or its legislative history that Congress intended to deny to commerce the protection which the collective bargaining required by the statute could afford against the burdens occasioned by labor disputes pending when the Act took effect.<sup>22</sup>

employees had been validly hired prior to the September refusal to bargain, they could not be displaced by reinstatement of the strikers, predicated upon that refusal. This was by no means a holding that the strike was not "current" in September.

<sup>21</sup> *National Labor Relations Board v. National Casket Co.*, 107 F. (2d) 992, 996 (C. C. A. 2); *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4), certiorari denied, 302 U. S. 731; *Standard Lime & Stone Co. v. National Labor Relations Board*, 97 F. (2d) 531, 535 (C. C. A. 4); *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575; 99 F. (2d) 533, certiorari denied, 306 U. S. 646.

<sup>22</sup> There is, plainly, no merit in the contention (Pet. in No. 387, pp. 13-14) that if the strikers in this case are held to be "employees" within the meaning of Section 2 (3), the Act is being given retroactive application. *Reynolds v. United States*, 292 U. S. 443, 449; *Cox v. Hart*, 260 U. S. 427, 435; *New York Central Railroad v. United States*, 212 U. S. 500; *Samuels v. McCurdy*, 267 U. S. 188, 193; *Ruppert v. Caffey*, 251 U. S. 264, 301; *In re Rahrer*, 140 U. S. 545, 564.

2. The finding that the strikers were discriminatorily refused reinstatement upon application prior to the termination of the strike on August 24, was likewise confirmed by the court below (R. 925) and is amply supported by the evidence. Bateman, the Company's employment manager, testified that during the first week of the strike he received instructions, which were never withdrawn, to "go slow" in reinstating any of the strikers (R. 142, 535). One of the strikers testified that on June 21, Bateman told him to remove his clothes from the locker furnished him by the Company, "because as far as you fellows are concerned, the strike is never going to be ended for you" (R. 298). On August 9, when a State Federation of Labor Committee which was trying to settle the strike requested the Company on behalf of the strikers to reinstate them, the Company replied unequivocally that it would not reinstate "any of the strikers" (R. 655). On August 21, a group of strikers applied to Bateman for individual reinstatement; he replied that "You strikers will never work for the Phelps Dodge Company again" (R. 104-106, 112-115, 159-160, 175-176, 199-200, 207-208, 400.) A final application for reinstatement, made one day before the strike was terminated on August 24, drew the response that "the position of the Company \* \* \* had not changed" (R. 658, 107-108). At the hearing Henrie, the assistant general superintendent of the mine, admitted that at the time of

the August 9 application and at all times thereafter, it was the Company's "policy" not to "put those men back to work" (R. 599-600, 658).

These refusals to permit any of the strikers to return to work occurred at a time when there were jobs available that they could fill. It is stipulated that between August 9 and 24, 21 such positions became available and were filled by hiring newcomers (R. 750-753). It is apparent that the strikers were denied consideration for these positions solely because they had exercised rights guaranteed and protected by the Act (Sections 13, 7, 8 (1)). The Company's apparent assertion (Pet. in No. 387, p. 12) that the strikers were merely refused "mass reinstatement," that such reinstatement was refused because their jobs "had been filled," and that there was no refusal to reinstate them as vacancies occurred disregards the evidence reviewed above.<sup>23</sup>

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<sup>23</sup> The findings of discrimination prior to August 24 are buttressed by the Company's steadfast refusals thereafter to give any of the strikers employment in its mine. Between August 24, 1935, and January 1938, when the hearing was held, the Company hired more than 2,000 additional employees (R. 751-752). During this period practically every striker applied for reinstatement, but the Company invariably refused to depart from its avowed policy of barring strikers from its employ. (R. 165-166, 170-171, 176, 181-182, 213, 219, 228-229, 232-233, 236-237, 255, 262, 266, 268-269, 273, 287, 291-292, 299, 303-304, 307, 314-316, 318, 320-321, 324, 333-334, 338, 343-344, 349-350, 353, 358-360, 367-368, 375-378, 388-389, 390, 395-396, 407, 412-413, 425-426, 435-437, 453-455, 465-466, 472, 478-479).

## II

**THE ORDER REQUIRING THE COMPANY TO EMPLOY OR  
TO REINSTATE, WITH BACK PAY, THE PERSONS ILLE-  
GALLY DISCRIMINATED AGAINST IS VALID**

The Board ordered the Company to employ or to reinstate, with back pay, thirty-seven of the strikers and Curtis and Daugherty. We shall first consider the validity of this order as based exclusively upon the admitted discrimination against Curtis and Daugherty and against the strikers as applicants for employment. Secondly, we point out that, whether or not the order is thus supportable, it is nevertheless valid as to the strikers as a remedy for the Company's discrimination against them as "employees". Thirdly, we argue that the order being otherwise valid it is not invalid as to the men who obtained substantially equivalent employment after the discrimination against them.

**A. THE ORDER IS A VALID REMEDY FOR THE COMPANY'S DISCRIMINATION AGAINST APPLICANTS FOR EMPLOYMENT**

Section 10 (c) directs the Board to require the employer to cease and desist from unfair labor practices found and

to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

We submit that under this provision the Board has power to direct the employment with back pay of illegally rejected applicants if such action will

effectuate the policies of the Act in the circumstances of the particular case, and that in this case such an order is appropriate to effectuate the Act's policies.

The Board found (R. 860-861, 912, 913, 914), and the Company does not challenge the findings, that if the Company's illegal discrimination had not occurred, the strikers and Curtis would have been taken back to work by January 1, 1936, and Daugherty by January 30, 1937. (The back pay provided in the Board's order runs from these dates. R. 917, 918). On such findings an order directing the employment of the rejected applicants with back pay does no more than restore the *status quo* which would have existed but for the unfair labor practices. It parallels and is equivalent to the familiar provision requiring the reinstatement with back pay of discharged employees or of employees discriminatorily denied reinstatement following a strike. The reinstatement remedy was referred to by Congress to illustrate a type of affirmative relief contemplated under the Act; further it would constitute relief appropriate to effectuate the Act's policies even if it were not specifically mentioned in Section 10 (c). *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548. Moreover, this Court has recognized that the Board "could not grant complete relief" in respect of persons discriminated against in reinstatement following a strike "short of ordering that the dis-

crimination be neutralized by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon the respondent's discrimination." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. Equally in the parallel situation of a discriminatory denial of employment, only an offer of employment with remedial back wages will undo the effects of the illegal discrimination and provide effective assurance for the future that workers may safely exercise the organizational rights guaranteed by the Act. "Nothing short of this would be efficacious at all." The *Waumbeec Mills* case, 114 F. (2d) at 235.<sup>24</sup>

1. *The example in Section 10 (c) is illustrative, and not restrictive.*—There is no basis for any contention that the inclusion in Section 10 (c) of the phrase "including reinstatement of employees with or without back pay" operates as a qualification upon the power of the Board to remedy illegal discrimination in hire. The phrase does not purport to be a part of an enumeration implying the exclusion of other similar remedies; indeed the word

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<sup>24</sup> Since the Company does not dispute the Board's findings that it would have employed the men but for their union membership and activities, we need not consider what affirmative relief would be within the Board's discretionary power in a case where it found that the employer discriminatorily refused to consider applicants for employment, but did not find that the applicants would have been hired but for the discrimination.

"including" imports but a particular instance in a general class. See *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 125n; *Springer v. Philippine Islands*, 277 U. S. 189, 206.

It is further clear from the legislative history that Congress intended that the Board's power to require affirmative action should extend to the remedying of all types of violations, and should be limited solely by the consideration whether its exercise would effectuate the policies of the Act in the circumstances of the particular case. The House Committee on Labor explained that upon finding that an employer has engaged in an unfair labor practice, the Board will issue an order

requiring such person to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the bill; i. e., as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing. The orders will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically pro-

vided for, i. e., the reinstatement of employees with or without back pay, as the circumstances dictate. [H. Rept. No. 1147, 74th Cong., 1st Sess., pp. 23-24.]<sup>25</sup>

The phrase in question plainly does not eliminate power to require the other forms of affirmative relief enumerated in the House Report when the Board properly finds, in administering the Act, that they will effectuate its policies. Cf. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. There is no firmer ground for supposing that a power to require the employment of discriminatorily rejected applicants is precluded, when such relief will further the Act's purposes.

This conclusion is indicated, we think, by this Court's opinion in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240. There the Board argued that even if the employee status of the strikers had been terminated by discharge, its power under Section 10 (c) was not confined to the "reinstatement of employees" but included the reinstatement of former employees if

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<sup>25</sup> In the *Waubesa Mills* case, 114 F. (2d) at 235, the court, upon consideration of the legislative history, concluded that "the phrase ['including reinstatement of employees with or without back pay'] was more probably inserted out of abundant caution to illustrate a type of relief appropriate to the commonly recurring unfair labor practice of discriminatory discharge, rather than put in for the purpose of limiting the remedial powers of the Board." See, also, Note (1939) 14 Wisconsin Law Review 445, 447-451.

such action was appropriate to effectuate the Act's policies (see 306 U. S. 252-253, 257). The majority of the Court, after holding that the strikers had ceased to be "employees" (pp. 254-257), disapproved of the order not on the ground that reinstatement of former employees was a type of affirmative action that was beyond the Board's power even if it did effectuate the Act's policies, but solely on the basis that the order would not effectuate the policies of the Act in the circumstances of that case (pp. 257-258).<sup>26</sup>

The court below in the present case and some of the other circuit courts of appeals (cases cited *infra*, p. 51) have regarded Section 10 (c) as restricting the exercise of the reinstatement power to persons who remained employees as defined in Section 2 (3). In practice, however, even those courts have not applied consistently the view that the phrase "reinstatement of employees with or without back pay" prohibits other similar relief. For if this phrase limits reinstatement to "employees," it might be expected that it would also limit back pay to employees who were directed reinstated. The Company so argues here with respect to the men who the court below held could not be reinstated because they may have obtained

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<sup>26</sup> That the majority considered that the order would be valid if it met that test is indicated by the concurring opinion of Mr. Justice Stone, who thought that the order should be set aside as to the discharged strikers solely on the ground that they were not "employees" (pp. 263-265).

substantially equivalent employment and with respect to the striker who was given back pay up to the time he became unemployable, but who was, of course, not reinstated. But the court below rejected this view, as seeming "to diminish unduly the scope of the Board's broad power to take some of the economic pinch out of labor troubles" (R. 927). Likewise the Fourth Circuit, while taking the restrictive view concerning the Board's power of reinstatement, has held that back pay may be awarded without reinstatement. *Mooreville Cotton Mills v. National Labor Relations Board*, 94 F. (2d) 61, 66. The only expression to the contrary is a dictum by one judge of the Ninth Circuit. *National Labor Relations Board v. Carlisle Lumber Co.*, 99 F. (2d) 533, 537, certiorari denied, 306 U. S. 646. Back pay without reinstatement has been enforced in numerous cases without discussion, although in some of these cases it was in fact challenged by counsel for the employer.<sup>27</sup>

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<sup>27</sup> E. g., *Link-Belt Co. v. National Labor Relations Board*, 110 F. (2d) 506, 511-512 (C. C. A. 7), Board order enforced in full, Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board v. Crystal Spring Finishing Co.*, 116 F. (2d) 669 (C. C. A. 1); *National Labor Relations Board v. Acme Air Appliance Co.*, decided February 3, 1941 (C. C. A. 2); *Burk Bros. v. National Labor Relations Board*, decided February 3, 1941 (C. C. A. 3); *National Labor Relations Board v. Dow Chemical Co.*, decided February 6, 1941 (C. C. A. 6); *New York Handkerchief Co. v. National Labor Relations Board*, 114 F. (2d) 144, 147-148 (C. C. A. 7), certiorari denied, No. 493, this Term; *National Labor Relations Board v. Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, 669, 672 (C. C. A. 8).

2. "*Employees*" is used in Section 10 (c) to mean members of the working class generally, and not employees of a particular employer.—If the argument just made be rejected, and it is held that the phrase "reinstatement of employees" in Section 10 (c) is restrictive and not illustrative, it by no means follows, as the majority below assume, that "employees" is used in Section 10 (c) to mean only those persons whose employment relation with the particular employer has been preserved under the definition in Section 2 (3). That section provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment \* \* \*

It will at once be seen that this provision defines "employee" in two different and quite inconsistent ways. It first provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise \* \* \*." "Employee" is thus first defined in its generic sense, as meaning members of the working class generally.

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<sup>22</sup> The Act "explicitly states otherwise" only in Sections 8 (5) and 9 (a). See *infra*, pp. 47-48.

But the definition then proceeds to say that "employee" shall include any person whose work has ceased in connection with any current labor dispute or because of any unfair labor practice "and who has not obtained any other regular and substantially equivalent employment". If this part of the definition is meant to exclude from the "employee" category persons who have obtained other equivalent employment, it is manifestly inconsistent with the first part of the definition, which encompasses the employees of any employer, except where the Act specifically states otherwise.

The explanation is to be found in the legislative history. The reports of the Congressional committees show that the definition of "employee" in Section 2 (3) was intended to serve two purposes. First, it was intended, together with the definition of "labor dispute" in Section 2 (9),<sup>29</sup> to recognize "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."<sup>30</sup> H. Rept. No. 1147, 74th Cong., 1st

<sup>29</sup> Sec. 2 (9) is set out *infra*, p. 69.

<sup>30</sup> The definition of "labor dispute" in Section 2 (9) was taken from the Norris-LaGuardia Act. (Senate Report, p. 7.) In this Act, as in the Norris-LaGuardia Act, it was intended to prevent an interpretation restricting the Act, as this Court had restricted § 20 of the Clayton Act, to relations between an employer and his own employees. (Senate Report, p. 7; *United States v. Hutcheson*, No. 43, this Term, decided February 3, 1941.) This fact, and the fact that the definition of "employee" in Section 2 (3) was intended to be read

Sess., p. 9. See also S. Rept. No. 573, 74th Cong., 1st Sess., pp. 6, 7. To this end "employee" was defined in the generic sense. Second, the definition was intended to preserve the employee status of striking workers and of workers deprived of work because of an unfair labor practice. Senate Report, pp. 6-7. For this purpose there was inserted the latter part of the definition: "and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment".

In the light of this history the proper interpretation of Section 2 (3) is evident. The first part of the definition, i. e., that "employee" means members of the working class, applies, as provided, "unless the Act explicitly states otherwise". The second part, on the other hand, applies whenever it becomes necessary to ascertain whether "the proximate relation of employer and employee" continues to exist between workers and a particular employer. Such an inquiry becomes pertinent under the Act only in connection with determining the representation of employees for collective bargaining pursuant to Section 9 (a) and (b), and in determin-

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with the definition of "labor dispute" in Section 2 (9), show that Congress intended the generic meaning of employee, that is "the business class or clan to which the parties litigant respectively belong." *Duplex Printing Co. v. Deering*, 252 Fed. 722, 748 (C. C. A. 2), reversed, 254 U. S. 443.

ing whether an employer has refused to bargain collectively with the representatives of "his employees" in violation of Section 8 (5). In each of these cases it must be determined what persons are employees of the particular employer or employers some or all of whose employees comprise the unit decided by the Board to be appropriate under Section 9 (b). Cf. *Marlin-Rockwell Corp. v. National Labor Relations Board*, decided January 6, 1941 (C. C. A. 2). Then, and only then, does the latter part of the definition in Section 2 (3) come into play.

The meaning of the provision in Section 2 (3) that "employee" shall mean employees of any employer "unless the Act explicitly states otherwise" thus becomes clear. The Act explicitly states otherwise in Section 8 (5), which prohibits an employer from refusing to bargain collectively with the representatives of "his" employees, subject to the provisions of Section 9 (a). Section 9 (a) provides that representatives designated by a majority of the employees in an appropriate unit shall be the exclusive bargaining representatives of all the employees in the unit, provided that any employee or group of employees shall have the right to present grievances to "their" employer. These two provisions, employing the words "his" and "their", are the only ones in the Act explicitly stating that they refer to employees of a particular employer rather than employees generally.

Other than this there is no indication in the Act that the latter part of the definition in Section 2 (3)

has any significance. And as observed by Judge Learned Hand, concurring in the present case (R. 929), a definition of "employees" in Section 7 "as limited to persons actually employed at the moment, \* \* \* would certainly mutilate the Act." This is equally true of course of the interpretation of "employees" in Section 10 (c) and in Section 8, except 8 (5).

Thus, even if the words "including reinstatement of employees" in Section 10 (c) be taken as restrictive, and Section 2 (3) is looked to to determine what persons are within the expressly granted remedy, we arrive at the conclusion that Congress intended "employees" so broadly that the supposed restriction is in fact no restriction at all. As already indicated, however, we do not think that the proper approach to the problem is through these technicalities of construction. Rather their very complexity indicates what is otherwise plain from the legislative history and from the terms of Section 10 (c), that the phrase "including reinstatement of employees with or without back pay" was in no way intended to limit the authority of the Board to direct "such affirmative action \* \* \* as will effectuate the policies of this Act."

B. IN ANY EVENT, THE ORDER IS A VALID REMEDY FOR THE COMPANY'S DISCRIMINATION AGAINST THE STRIKERS AS "EMPLOYEES"

The strikers ordered reinstated fall into two groups: those who did not obtain "any other regu-

lar and substantially equivalent employment" within the meaning of Section 2 (3) after the discrimination against them, and (2) those who did obtain such employment.<sup>31</sup> As to those who did not obtain other equivalent employment, it is plain that the order constitutes an appropriate exercise of the Board's power to require the "reinstatement of employees with or without back pay". *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47-48; *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U. S. 318; *National Labor Relations Board v. Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941. This is so wholly aside from the proposition, just argued in Point A above, that the order may be supported as to the strikers, as well as to Curtis and Daugherty, on the discrimination against them as applicants for employment.

As to the second group of strikers, the only question is whether the order, being otherwise valid, is invalid as to them because they obtained other substantially equivalent employment. This question is treated in our discussion under Point C below.

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<sup>31</sup> Inasmuch as the Board has not sought review of the lower court's holding that there is insufficient evidence to support the Board's findings that none of the strikers obtained regular and substantially equivalent employment, our argument assumes as a premise that those of the strikers as to whom a remand was ordered did in fact obtain such employment.

C. THE ORDER IS NOT INVALID AS TO THE MEN WHO OBTAINED  
SUBSTANTIALLY EQUIVALENT EMPLOYMENT

The court below held, in accord with decisions of two other circuit courts of appeals,<sup>32</sup> that the strikers who obtained equivalent employment subsequent to the discrimination ceased to be "employees" within the meaning of Section 2 (3) and therefore could not be reinstated (R. 927).<sup>32a</sup> If, as we have argued, the term "employees" is used in its generic sense in Section 10 (c), so that workers are not excluded from the term upon obtaining other substantially equivalent employment, the decision below is, of course, incorrect. Putting aside that contention, it is apparent that the holding below is based upon the restrictive construction of Section 10 (c) which would limit the Board's power to direct affirmative relief to the "reinstatement of employees with or without back pay". We have argued that that construction is incorrect, and that the Board's power is subject to the sole limi-

<sup>32</sup> *Mooreville Cotton Mills v. National Labor Relations Board*, 94 F. (2d) 61, 65-66 (C. C. A. 4); *National Labor Relations Board v. Carlisle Lumber Co.*, 99 F. (2d) 533, 538-539 (C. C. A. 9), certiorari denied, 306 U. S. 646 (employer's petition). Compare *National Labor Relations Board v. Botany Worsted Mills*, 106 F. (2d) 263, 269 (C. C. A. 3). But cf. *Continental Oil Co. v. National Labor Relations Board*, 113 F. (2d) 473, 455 (C. C. A. 10), pending argument herewith, No. 413, this Term.

<sup>32a</sup> Since it held that discrimination against applicants for employment did not violate Section 8 (3), the court had no occasion to consider whether the obtainment of equivalent employment would preclude an order directing the employer to employ the rejected applicants.

tation that its exercise must "effectuate the policies of this Act." Assuming that to be so, we now address ourselves to the question whether the Board could properly find that the reinstatement order will effectuate the Act even as to those workers who obtained equivalent employment.

The issue reduces itself to whether the Board, in the exercise of its judgment and discretion "in choosing the particular affirmative relief to be ordered" (*National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265), could reasonably determine that the restoration of the men who obtained equivalent employment to the positions from which they had been discriminatorily excluded by the Company would effectuate the Act's policies. We submit that the Board could so determine. A contention that the normal remedy for discriminatory exclusion from work becomes inappropriate merely because the victim is satisfactorily situated elsewhere, would, if accepted, reduce the "policies of this Act" which the affirmative relief authorized by Section 10 (c) is designed to effectuate, to mere vindication of private rights and restitution for private wrongs, which they plainly are not. Section 1; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 24; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 266, 269; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 362. Section 10 (c) empowers the Board to require such action as is appropriate to restore conditions permitting free

exercise of the rights of self-organization and collective bargaining."<sup>33</sup> In a case, such as the present one, where the employer has excluded from its employ every worker who dared to exercise the rights guaranteed in the statute, the danger associated with joining a labor organization is cogently impressed upon every employee of the employer. The Board may reasonably believe that these deeply coercive effects upon all the employees in a plant may be dissipated only by a demonstration that the Act carries sufficient force to restore to their jobs those who have been penalized for exercising the rights which it guarantees.

Necessity almost always compels a worker who has been discharged to seek the best available other employment. By elimination of the union leaders, or of the leaders in an organizational campaign barely under way, the employer may abruptly terminate all exercise of the right of self-organization in his plant and then rely upon the victims' necessity of earning a livelihood elsewhere for assurance that he is permanently rid of them. See Note, 49 Yale L. J. 953, 954. The economic forces set in motion by the employer thus may, under the view taken by the court below, serve to preclude the

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<sup>33</sup> *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 10, 12; *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board v. Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250.

only remedy effective to restore the freedom which the employer's unfair labor practices have destroyed. But the Board's power extends "to the prevention of [the employer's] enjoyment of any advantage which he has gained by violation of the Act". *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 364. Specifically, it should plainly include the neutralization of "any prestige he may have for ridding his organization of those who oppose his attempt \* \* \* to destroy their right to organize." *National Labor Relations Board v. American Potash & Chemical Corp.*, 113 F. (2d) 232, 235 (C. C. A. 9).

In sum, we submit that the obtainment of equivalent employment by a discriminatorily excluded employee does not in itself remove the basis upon which the Board may reasonably conclude that his reinstatement is appropriate to effectuate the policies of the Act. The conclusion is warranted that the Company's complete destruction of the right of self-organization in its plant through wholesale elimination of all union members can be undone only by reinstatement of those excluded.

### III

THE MODIFICATION OF THE BACK-PAY ORDER TO REQUIRE DEDUCTION OF THE AMOUNT WHICH EACH INDIVIDUAL "FAILED WITHOUT EXCUSE TO EARN" IS IMPROPER

The court below modified the back-pay order by providing that there be deducted from such pay, in the case of each individual, the amount which he

"failed without excuse to earn".<sup>24</sup> The rationale of this modification is that "There is no reason to suppose that Congress intended to have those who had unlawfully been deprived of their jobs maintained in idleness beyond the period when they had an opportunity to do work they were fitted to perform. They were bound to use reasonable efforts to find work and to keep employed. It is only to the extent that their earnings were diminished after they made such efforts that they are entitled to be made whole" (R. 928).

Thus, the court has read into the Board's express power to direct the payment of back pay (Section 10 (c)) the doctrine of mitigation of damages applicable in suits at common law for breach of employment contracts. That doctrine plainly has no application under the Act, as the Circuit Court of Appeals for the Ninth Circuit has held. *National Labor Relations Board v. Carlisle Lumber Co.*, 99 F. (2) 533, 539-540 (C. C. A. 9), certiorari denied, 306 U. S. 646. See *National Labor Relations Board v. West Kentucky Coal Co.*, 116 F. (2d) 816, 821, (C. C. A. 6). No "private right of action" to recover back pay is contemplated by the Act.

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<sup>24</sup> While the opinion might be read as meaning that this deduction is required only in the case of persons who obtained but voluntarily relinquished other employment (R. 928), the decree, settled after notice and argument by the Board that it should be so limited, requires the unqualified deduction noted in the text in the case of every individual (R. 931-932).

*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 267-268; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 362. A back pay order does not award "damages" but constitutes "a public reparation order" designed to further the public interests expressed in the Act. *Agwilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146, 150-151 (C. C. A. 5). For these purposes, the Act authorizes the Board to remedy the effects of unfair labor practices by requiring the employer "to make good to the employees what they had lost" as a result of the discrimination against them. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 13. In the present case the employees have sustained definite, measurable losses of pay, the difference between the wages they would have received from the Company except for its unfair labor practices and the amount which they did in fact earn elsewhere. The modification below denies to the Board power "to make the employees whole." The *Republic Steel* case, 311 U. S. at p. 9.

Further, it is apparent that the modification would place upon the Board an impossible administrative burden. Particularly in a case like the present, involving back pay accruing over a number of years to a large number of men, it would be a tremendous task to ascertain, in each instance, the employment opportunities available in the lines of work which each man was qualified to perform,

and to inquire into the intensity and good faith of the efforts made by each to support himself. To require such an inquiry in each of the hundreds of individual cases each year in which the Board directs an award of back pay, would seriously impair the carrying on of the Board's functions. We do not believe that it was the intent of Congress to preclude effective administration of the Act by requiring the Board to dissipate its energies in time-consuming and speculative inquiries into earnings which were not made but were arguably possible.

The opinion below contains no indication of how it is to be proved that the worker "failed without excuse to earn" certain sums of money. In the case of a Chicago machinist, the employer may conceivably be free to adduce evidence concerning employment opportunities at each machine shop in that city during a given period of time, and to intimate that the opportunity and the applicant might have met had he exerted greater efforts. Nor is the nature of the "excuse" provable at all clear: a certain number of miles walked per day might offer clear vindication, but failure of a literate applicant to discover an advertisement in a paper other than the one he usually takes might occasion serious doubts. Examination into multifarious questions of this type would plainly constitute an arduous task.

The difficulties to which such inquiry would give rise far outweigh the fancied necessity for it. It is

a matter of common knowledge that working men are rarely persons of independent or accumulated means. They are unable to remain without employment for long periods after discrimination against them in the hope that eventually they will be reimbursed for their idleness. They are required by forces more potent than the modification below to seek means of livelihood. If they find it, the proceeds accrue to the benefit of the employer in the form of deductions from the back-pay order. To go further and require a burdensome inquiry in each case so as to care for the rare instance in which the employee finds it possible to remain idle is not warranted.

#### IV

#### THE BACK PAY ORDERED BY THE BOARD IS NOT "EXCESSIVE AND ARBITRARY"

The Company contends that because of the length of time elapsing between the unfair labor practices and the Board's order, the back pay award is "excessive and arbitrary" and should have been modified by the court below (Pet. in No. 387, pp. 15-16). No specific modification is suggested, the argument apparently being that the reviewing court should devise some form of equitable relief. The court below rejected the claim, stating that it was not satisfied that the Company had a "just grievance" on the score of delay (R. 929).


The time schedule of this proceeding is as follows: The unfair labor practices occurred in August 1935. The charge was filed with the Board on May 25, 1937 (R. 4-5) and an amended charge on December 18, 1937 (R. 6-9). The Board's complaint issued on January 10, 1938 (R. 10-27). A hearing before a trial examiner was held from January 27 to February 3, 1938. The trial examiner filed his Intermediate Report on March 16, 1938 (R. 687-717). The Company filed exceptions (R. 718-746) and on April 1, 1938, requested oral argument before the Board (R. 747), which took place on May 5, 1938 (R. 749). A stipulation concerning certain additional matters was entered into on January 11, 1939 (R. 750-828) and on June 23, 1939, the Company requested further oral argument before the Board (R. 831). Such argument was set for July 11, 1939, but upon the request of counsel for the Company was postponed to July 20, 1939, when it took place (R. 832-836). The Board's Decision and Order was issued on January 16, 1940 (R. 837-919).

The back pay awarded to each of the strikers except Waters runs from January 1, 1936, the date by which the Board found that all of the strikers would have been reinstated had no discrimination occurred to the time when an offer of reinstatement is made or the employee is placed on a preferential list (R. 917-918, 912-914). Waters is to receive

back pay from January 1, 1936 to January 1, 1937, when he became unemployable (R. 917-918, 913). Curtis and Daugherty are to receive back pay from January 1, 1936 and January 30, 1937, respectively, which are the dates by which the Board found they would have been hired in the absence of discrimination, to the date of compliance, but excluding in each case the period from March 16, 1938 to January 16, 1940, during which the trial examiner's recommendation that the complaint be dismissed as to these two men was outstanding (R. 918-919, 913-914).

The assertion, upon which the Company's entire contention is grounded, that back pay has been "accumulating in large amounts" (Pet. in No. 387, p. 16), is not readily verifiable. By May 1937 approximately half of the strikers had obtained positions with the Shattuck Denn Mining Company at wages equal to those paid by the Company, and others of the strikers also obtained work elsewhere (R. 866-906); these other earnings are deductible from the back pay provided in the order (R. 917-918). Further large deductions from the amounts which the Company is required to pay will probably result from elimination of the "work relief" provision. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7.

In any event, and assuming that equitable pleas may be advanced against the Board's exercise of a power specifically granted by Section 10 (c) of



the Act,<sup>33</sup> we submit that the plea must fail in this case for the reason that the equities are not clearly pointed in the employer's favor. Hence, and in view of the Board's wide discretion under Section 10 (c) (see cases cited, *supra*, pp. 52-53), it may be doubted whether any delay on the part of the strikers or the Board would warrant the overturning of the Board's refusal to shift from the Company to the workers the burden of loss resulting from the unfair labor practices. Certainly a stronger showing than the Company can make in this case is a prerequisite to such a result.

The Company does not attribute to the workers delay after the charges were filed with the Board, but asserts that the first period of delay, from January 1, 1936 (when back pay commences in the case of all except Daugherty) to May 25, 1937, resulted directly from the failure of the employees to file charges until the latter date. But the widespread attacks upon the constitutionality of the Act<sup>34</sup> prior

<sup>33</sup> If the Company's claim is in the nature of laches it is not available in this proceeding brought by an agency of the Federal Government. *Chesapeake & Delaware Canal Co. v. United States*, 250 U. S. 123; *Board of Commissioners v. United States*, 308 U. S. 343; *National Labor Relations Board v. Nebel Knitting Co.*, 103 F. (2d) 594 (C. C. A. 4).

<sup>34</sup> See, e. g., American Liberty League, National Lawyers' Committee, *Report on the Constitutionality of the National Labor Relations Act* (1935); S. Rept. No. 6, Pt. 5, 76th Cong., 1st Sess., *Labor Policies of Employers Association, Part III, The National Association of Manufacturers*, p. 125; *id. Part I, The National Metal Trades Association*, p. 59.

to the decisions of this Court in April 1937 sustaining it, including the institution of more than eighty suits for injunctions against the Board or its representatives,<sup>37</sup> discouraged employees from instituting proceedings under the Act.<sup>38</sup> Reliance upon the Act appeared to be particularly futile in regard to mining enterprises such as that operated by the Company (Compare *Carter v. Carter Coal Co.*, 298 U. S. 238), and, although the Board at all times maintained that the Act applied to enterprises of that type if their stoppage would affect commerce, it did not proceed upon charges filed in mining cases

<sup>37</sup> See, e. g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U. S. 54. See, also, Gelhorn and Linfield, *Politics and Labor Relations, N. L. R. B. Procedure*, 39 Columbia L. Rev. 339; *First Annual Report of the National Labor Relations Board* (1936), pp. 46-47; *Report of the Proceedings of the Fifty-seventh Annual Convention of the American Federation of Labor*, 1937, address of J. Warren Madden, Chairman, National Labor Relations Board, p. 231; *Report of the Proceedings of the Fifty-sixth Annual Convention of the American Federation of Labor*, 1936, address of Edwin S. Smith, Member, National Labor Relations Board, p. 414; *id.*, *Report of the Executive Council*, p. 157; Brooks, *Unions of Their Own Choosing* (1939), pp. 122-123; Keir, *Labor Problems from Both Sides* (1938), p. 211.

<sup>38</sup> See *Report of the National Executive Committee of the American Newspaper Guild*, in *The Guild Reporter*, May 15, 1936, p. 10, characterizing proceedings by employees before the Board as nothing more "than a means of publicizing their cause." See also, Daugherty, *Labor Problems In American Industry* (1938), p. 937; Brooks, *Unions of Their Own Choosing* (1939), p. 122-123; Howard, *Annual Report to the International Typographical Union for the Fiscal Year Ending June 20, 1936*, p. 7.

prior to the decisions of this Court upholding the Act. Even had the employees filed charges promptly, therefore, the delays prior to May 25, 1937, would not have been avoided.

It is not contended that the employees could have done anything about the delays ensuing between the filing of charges on May 25, 1937, and the issuance of the Board's order on January 16, 1940: the claim as to this period must be that the back pay which the statute authorizes should be diminished in this case because of slowness on the part of the tribunal before which the employees laid their case, rather than because of any fault on the part of the employees. But delay is an incident of litigation, whether before courts or administrative bodies. When the Company chose, in March 1938, to contest the findings of the trial examiner that it had illegally discriminated against the strikers and to disregard his recommendations that they be reinstated with back pay, it assumed the risk of accumulating liability while the litigation ran the course dictated by the whole of the work of the administrative agency and, thereafter, of the courts. The Company could have avoided that risk by reinstating the strikers pending determination of its claim that it was under no obligation to do so. It chose instead to run the risk against whose fruition it now complains.

Nor were the delays on the Board's part capricious, as the Company appears to assume. The

tremendous influx of new proceedings after the decisions of this Court upholding the Act literally overwhelmed the Board's staff, adjusted in size and operation to the previous calendars." Although the process of presentation and decision was greatly speeded up, "a tremendous backlog of un-

"The statistics on cases pending during the year 1937 demonstrate the increase of work after the Supreme Court decisions on April 12: January, 424; February, 497; March, 593; April, 855; May, 1,471; June, 2,059; July, 2,633; August 3,017; September, 3,251; October, 3,507; November, 3,516; December, 3,445. The increase was steady during 1938, reaching a high of 4,101 cases in December. By June 1939 there were 4,211 cases pending.

"The hearings held before trial examiners of the Board during 1937 were as follows: January, 10; February, 9; March, 12; April, 9; May, 16; June, 35; July, 64; August, 67; September, 51; October, 78; November, 98; December 97. In March 1938, 116 hearings were conducted, in June 1938, 98.

Decisions issued by the Board during 1937, by months, were as follows: January, 3; February, 1; March, 7; April, 3; May, 7; June, 18; July, 13; August, 21; September, 21; October, 24; November, 18; December, 39. For 1938 the corresponding figures are: January, 37; February, 63; March, 52; April, 39; May, 53; June, 58; July, 49; August, 24; September, 40; October, 31; November, 58; December, 57. The highest monthly totals were 84 in October 1939 and 94 in March 1940. The totals of cases closed, through decision and in other ways, by months during 1937, were as follows: January, 119; February, 122; March, 143; April, 216; May, 448; June, 697; July, 769; August, 738; September, 758; October, 797; November, 913; December, 682. The corresponding figures for 1938 were: January, 854; February, 531; March, 711; April, 592; May, 740; June, 589; July, 548; August, 630; September, 522; October, 594; November, 548; December, 481.

decided cases rapidly accumulated.<sup>41</sup> Despite the acute problem thus occasioned, the Board's record on the question of delays compares favorably with those of other administrative agencies and of the federal district courts.<sup>42</sup> Others than the Company suffered disadvantages from the Board's crowded dockets: the rights guaranteed by the Act are peculiarly subject to destruction if not afforded the prompt protection which Congress intended (Section 10 (i)) and the employees in this and other cases were forced to wait long for redress of the wrongs done them.

There is, in short, no sound basis for a contention that the continuing economic loss initially caused by the Company's determination to rid itself of union men should be shifted to the employees, who are certainly less responsible for it than the one whose illegal conduct is the root of the entire proceeding. We submit that it was not arbitrary for the Board and the court below to reject suggested curtailment of the proper and normal relief against unfair practices of this type and thus to make the relief incomplete as well as late.

#### CONCLUSION

For the reasons stated, we submit that the judgment below should be affirmed in No. 387 (the Com-

<sup>41</sup> On July 1, 1937, 2,054 cases were before the Board in various stages. By July 1, 1938, this figure had increased to 3,781.

<sup>42</sup> *Hearings before the Special Committee to Investigate National Labor Relations Board, House of Representatives* (70th Cong., 3rd Sess.), Vol. II, pp. 546-550.

pany's petition) and reversed in No. 641 (the Board's petition), and that the case should be remanded to the court below with directions to enforce the order of the Board without modification except as to its work relief and notice provisions (see *supra*, note 5, pp. 7-8).

Respectfully submitted.

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MARCH 1941.

## APPENDIX

### NATIONAL LABOR RELATIONS ACT

(Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. v, Sec. 151, *et seq.*)

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

## DEFINITIONS

## SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

## RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representa-

tives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C. Supp., VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

#### REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing

upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [so in original] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

#### PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. \* \* \*

(c) \* \* \* If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. \* \* \*

(e) \* \* \* No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. \* \* \*

#### LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike. \* \* \*

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# SUPREME COURT OF THE UNITED STATES.

Nos. 387, 641.—OCTOBER TERM, 1940.

Phelps Dodge Corporation, Petitioner,  
387 vs.

National Labor Relations Board.

National Labor Relations Board,  
Petitioner,

641

vs.

Phelps Dodge Corporation.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Second Circuit.

[April 28, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to "effectuate the policies of this Act", if it finds such discrimination in hiring an "unfair labor practice". Other questions touching the remedial powers of the Board are also involved. We granted a petition by the Phelps Dodge Corporation and a cross-petition by the Board, 311 U. S. —, —, to review a decision by the Circuit Court of Appeals for the Second Circuit, 113 F. (2d) 202, which enforced the order of the Board, 19 N. L. R. B. No. 60, with modifications. The main issue is intrinsically important and has stirred a conflict of decisions. *National Labor Relations Board v. Waumbeec Mills*, 114 F. (2d) 226.

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.* The basis of the Board's conclusion that the Corporation

2 *Phelps Dodge Corp. vs. National Labor Relations Board.*

had committed unfair labor practices in violation of § 8(3) of the Act was a finding, not challenged here, that a number of men had been refused employment because of their affiliations with the Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To "effectuate the policies" of the Act, § 10(c), the Board ordered the Corporation to offer Curtis and Daugherty jobs and to make them whole for the loss of pay resulting from the refusal to hire them, and it ordered thirty-seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty.

*First.* The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. Therefore, in determining whether such discrimination legally survives the National Labor Relations Act, the history which led to the Act and the aims which infuse it give direction to our inquiry. Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was "to eliminate the causes of certain substantial obstructions to the free flow of commerce". This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association". § 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. "The Act", this Court has said, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them". But "under cover of that right", the employer may not "intimidate or coerce its employees with respect to their self-organization and representation." When "employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge". *Labor Board v.*

*Jones & Laughlin*, 301 U. S. 1, 45, 46. This is so because of the nature of modern industrialism. Labor unions were organized "out of the necessities of the situation. . . . Union was essential to give laborers opportunities to deal on equality with their employer". Such was the view, on behalf of the Court, of Chief Justice Taft, *American Foundries v. Tri-City Council*, 257 U. S. 184, 209, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free.

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars.<sup>1</sup> Because of the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workingman's right of association by discriminatory practices at the point of hiring.<sup>2</sup> Kindred legislation has been put on the statute books of more than half the states.<sup>3</sup> And

<sup>1</sup> United States Industrial Commission, Final Report (1902) p. 893; Anthracite Coal Strike Commission, Report to the President on the Coal Strike of May-October, 1902, S. Doc. No. 6, 58th Cong., Spec. Sess., p. 78; Laidler, Boycotts and the Labor Struggle (1913) p. 39 *et seq.*; United States Commission on Industrial Relations, Final Report (1916) S. Doc. No. 415, 64th Cong., 1st Sess., p. 118; Interchurch World Movement, Commission of Inquiry, Report on the Steel Strike of 1919 (1920) pp. 27, 209, 219; Bonnet, Employers' Associations in the United States (1922) pp. 80, 296, 550; Gulick, Labor Policy of the United States Steel Corporation (1924) pp. 125-27; Cummins, The Labor Problem in the United States (2d ed. 1935) p. 351; Bureau of Labor Investigation of Western Union and Postal Telegraph-Cable Companies (1909) S. Doc. No. 725, 60th Cong., 2d Sess., pp. 39-41; S. Rep. No. 46, Part 1, 75th Cong., 1st Sess., p. 8.

<sup>2</sup> 30 Stat. 424; see United States Strike Commission, Report on the Chicago Strike of June-July, 1894, S. Doc. No. 7, 53d Cong., 3d Sess.; Olney, Discrimination Against Union Labor—Legal? (1908) 42 Amer. L. Rev. 161.

<sup>3</sup> Ala. Code Ann. (1928) § 3451; Ark., Acts of 1905, Act 214, p. 545; Cal. Labor Code (1937) §§ 1050-54; Colo. Stat. Ann. (1935) c. 97, §§ 88, 89, 93; Conn. Gen. Stat. (1930) §§ 6210-11; Fla. Comp. Gen. Laws Ann. (1927) § 6606; Ill. Ann. Stat. (1935) c. 38, § 139; Ind. Stat. Ann. (1933) §§ 40-301, 40-302; Iowa Code (1939) §§ 13253-54; Kan. Gen. Stat. (1935) §§ 44-117, 44-118, 44-119; Me. Laws (1933) c. 108; Minn. Stat. (1927) § 10378; Miss. Code Ann. (1927) §§ 9271-74; Mo. Rev. Stat. (1939) § 4643; Mont. Rev. Code Ann. (1935) §§ 3093-94; Nev. Comp.

#### 4 *Phelps Dodge Corp. vs. National Labor Relations Board.*

during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that "The right of workers to organize in trade-unions and to bargain collectively . . . shall not be denied, abridged, or interfered with by the employers in any manner whatsoever".<sup>4</sup> Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices Congress did not leave the matter at large. The practices condemned "are strictly limited to those enumerated in section 8", S. Rep. No. 573, 74th Cong., 1st Sess., p. 8. Section 8(3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that "It shall be an unfair labor practice for an employer . . . By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization".

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to deter-

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Laws (1929) §§ 10461-63; N. M. Stat. Ann. (1929) §§ 35-4613, 35-4614, 35-4615; New York Labor Law § 704(2), (9); N. C. Code Ann. (1939) §§ 4477-78; N. D. Comp. Laws Ann. (1913) § 9446; Okla. Stat. Ann. (1937) tit. 40, §§ 172-73; Ore. Comp. Laws Ann. (1940) §§ 102-806, 102-807; Tex. Stat. (1936) arts. 1616-1618; Utah Rev. Stat. Ann. (1933) §§ 49-5-1, 49-5-2; Va. Code (1936) § 1817; Wash. Rev. Stat. Ann. (1932) § 7599; Wis. Stat. (1939) § 343.582. See (1937) 37 Col. L. Rev. 816, 819; Witte, *The Government in Labor Disputes* (1937) pp. 213-18.

<sup>4</sup> Awards of the National War Labor Board: Sloss-Sheffield Steel & Iron Co., Docket No. 12. See also Omaha & Council Bluffs Street Ry., Docket No. 154; Smith & Wesson Co., Docket No. 273. Cf. Gregg, *The National War Labor Board* (1919) 33 Harv. L. Rev. 39.

mine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a means towards the accomplishment of the main object of the legislation. We are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of § 8(3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the prohibition against "discrimination in regard to . . . any term or condition of employment". Contemporaneous legislative history,<sup>5</sup> and, above all, the background of industrial experience forbid such textual mutilation.

The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them". It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.

We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *Labor Board v. Jones & Laughlin*, 301 U. S. 1. So far as questions of constitu-

<sup>5</sup> Rather clearly the House Committee which reported the bill viewed the word "hire" as covering the situation before us. H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 19. The Chairman of the Senate Committee expressly stated during the debate that "no employer may discriminate in hiring a man whether he belongs to a union or not, and without regard to what union he belongs [except where there is a valid closed shop agreement]". 79 Cong. Rec. 7674. For further materials bearing on the legislative history see the able opinion of Judge Magruder in *National Labor Relations Board v. Waumbes Mills*, 114 F. (2d) 226.

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tionality are concerned we need not enlarge on the statement of Judge Learned Hand in his opinion below that there is "no greater limitation in denying him [the employer] the power to discriminate in hiring than in discharging". The course of decisions in this Court since *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, have completely sapped those cases of their authority. *Pennsylvania R. R. v. Labor Board*, 261 U. S. 72; *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548; *Virginian Ry. v. Federation*, 300 U. S. 515; *Labor Board v. Jones & Laughlin, supra*.

*Second.* Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8(3), the remedial authority of the Board under § 10(c) became operative. Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from § 10(c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized", *Labor Board v. Mackay Co.*, 304 U. S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act". Therefore, if § 10(c) had empowered the Board to "take such affirmative action as will effectuate the policies of this Act", the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act. *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S.

548.<sup>6</sup> Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. Compare *Virginian Ry. v. Federation*, 300 U. S. 515, 552. To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board "to take such affirmative action as will effectuate the policies of this Act", *simpliciter*, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance. *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 125, note.

*Third.* We agree with the court below that the record warrants the Board's finding that the strikers were denied reemployment because of their union activities. Having held that the Board can neutralize such discrimination in the case of men seeking new employment, the Board certainly had this power in regard to the strikers. And so we need not consider whether the order concerning the strikers should stand, as the court below held it should, even though that against Curtis and Daugherty would fall.

*Fourth.* There remain for consideration the limitations upon the Board's power to undo the effects of discrimination. Specifically, we have the question of the Board's power to order employment in cases where the men discriminated against had obtained "substantially equivalent employment". The Board as a matter

<sup>6</sup> An injunction had been granted against interference with the workers' self-organization and reinstatement was ordered in contempt proceedings after employees had been discharged for union activities. Surely, a court of equity has no greater inherent authority in this regard than was conveyed to the Board by the broad grant of all such remedial powers as will, from case to case, translate into actuality the policies of the Act.

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of fact found that no such employment had been obtained, but alternatively concluded that, in any event, the men should be offered employment. The court below, on the other hand, in harmony with three other circuits, *Mooreville Cotton Mills v. National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4th); *National Labor Relations Board v. Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3rd); *National Labor Relations Board v. Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9th), ruled that employment need not be offered any worker who had obtained such employment, and since the record as to some of the strikers who had gone to work at the Shuttuck Denn Company was indecisive on this issue, remanded the case to the Board for further findings. This aspect of the Board's authority depends on the relation of the general remedial powers conferred by § 10(c) to the provisions of § 2(3).

The specific provisions of the Act out of which the proper conclusion is to be drawn should be before us. Section 10(c), as we already know, authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". The relevant portions of Section 2(3) follow: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment".

Merely as a matter of textual reading these provisions in combination permit three possible constructions: (1) a curtailment of the powers of the Board to take affirmative action by reading into § 10(c) the restrictive phrase of § 2(3) regarding a worker "who has not obtained any other regular and substantially equivalent employment"; (2) a completely distributive reading of § 10(c) and § 2(3), whereby the factor of "regular and substantially equivalent employment" in no way limits the Board's usual power to require employment to be offered a worker who has lost employment because of discrimination; (3) an avoidance of this either-or reading of the statute by pursuing the central clue to the Board's powers—effectuation of the policies of the Act—and in that light appraising the relevance of a worker's having obtained "substantially equivalent employment".

Denial of the Board's power to order opportunities of employment in this situation derives wholly from an infiltration of a portion of § 2(3) into § 10(c). The argument runs thus: § 10(c) specifically refers to "reinstatement of employees"; the latter portion of § 2(3) refers to an "employee" as a person "who has not obtained any other regular and substantially equivalent employment"; therefore, there can be no reinstatement of an employee who has obtained such employment. The syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated. In the first place, we have seen that the Board's power to order an opportunity for employment does not derive from the phrase "including reinstatement of employees with or without back pay", and is not limited by it. Secondly, insofar as any argument is to be drawn from the reference to "employees" in § 10(c), it must be noted that the reference is to "employees", unqualified and undifferentiated. To circumscribe the general class, "employees", we must find authority either in the policy of the Act or in some specific delimiting provision of it.

Not only is the Act devoid of a comprehensive definition of "employee" restrictive of § 10(c) but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. "The term employee", the section reads, "shall include any employee, and shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise. . . ." This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. Cf. *New Negro Alliance v. Grocery Co.*, 303 U. S. 552. The broad definition of "employee", "unless the Act explicitly states otherwise", as well as the definition of "labor dispute" in § 2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer". H. R. Rep. No.

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1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

The reference in § 2(3) to workers who have "obtained regular and substantially equivalent employment" has a rôle consonant with some purposes of the Act but not one destructive of the broad definition of "employee" with which § 2(3) begins. In determining whether an employer has refused to bargain collectively with the representatives of "his employees" in violation of § 8(5) and § 9(a) it is of course essential to determine who constitute "his employees". One aspect of this is covered by § 9(b) which provides for determination of the appropriate bargaining unit. And once the unit is selected, the reference in § 2(3) to workers who have obtained equivalent employment comes into operation in determining who shall be treated as employees within the unit.

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the "policies of this Act" to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining". *National Licorice Co. v. Labor Board*, 309 U. S. 350, 362; and see *Amalgamated Workers v. Edison Co.*, 309 U. S. 261. To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to

wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization.

Therefore, the mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination has been found. A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his

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employment because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for union activities and had sought re-employment after having offered his services as a labor spy. *Matter of Thompson Cabinet Company*, 11 N. L. R. B. 1103, 1116-17.

From the beginning the Board has recognized that a worker who has obtained equivalent employment is in a different position from one who has lost his job as well as his wages through an employer's unfair labor practice. In early decisions, the Board did not order reinstatement of workers who had secured such equivalent employment. See *Matter of Rabhor Company, Inc.*, 1 N. L. R. B. 470, 481; *Matter of Jeffery-De Witt Insulator Company*, 1 N. L. R. B. 618, 628. It apparently focussed on the absence of loss of wages in determining the applicable remedy. But other factors may well enter into the appropriateness of ordering the offending employer to offer employment to one illegally denied it. Reinstatement may be the effective assurance of the right of self-organization. Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged. On the other hand, it may be, as was urged on behalf of the Board in *Mooreville Cotton Mills v. National Labor Relations Board*, 97 F. (2d) 959, 963, that, in making such an order for reinstatement the necessity for making room for the old employees by discharging new ones, as well as questions affecting the dislocation of the business, ought to be considered. All these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us. In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement. We have no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.

The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment "for the reasons set forth in" *Matter of*

*Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, 833. But in that case the Board merely concluded that § 2(3) did not deny it the power to order reinstatement; it did not consider the appropriateness of its exercise. Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced. The court below found, and the Board has not challenged the finding, that the Board left the issue of equivalence of jobs at the Shattuck Denn Company in doubt, and remanded the order to the Board for further findings. Of course, if the Board finds that equivalent employment has not been obtained, it is within its province to require offers of reemployment in accordance with its general conclusion that a worker's loss in wages and in general working conditions must be made whole. Even if it should find that equivalent jobs were secured by the men who suffered from discrimination, it may order employment at Phelps Dodge if it finds that to do so would effectuate the policies of the Act. We believe that the procedure we have indicated will likewise effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board.

From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. The Board first found that the men had not obtained substantially equivalent employment within the meaning of § 2(3); later it concluded that even if they had obtained such employment it would order their reinstatement. It did so, however, as we have noted, merely because it asserted its legal power so to do. When the court below held that proof did not support the Board's finding concerning equivalence of employment at Shattuck Denn and remanded the case to the Board for additional evidence on that issue, the Board took this issue out of the case by expressly declining to ask for its review here.

The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10(e) and (f)), it will avoid needless litigation and make for

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effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

*Fifth.* As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers "failed without excuse to earn", and the Board here challenges this modification.

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to

attain just results in diverse, complicated situations.<sup>7</sup> See (1939) 48 Yale L. J. 1265. The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employ-

<sup>7</sup> In accordance with the Board's general practice, deductions were made in the present case for amounts earned during the period of the back pay award. But the deductions have been limited to earnings during the hours when the worker would have been employed by the employer in question. *Matter of Pusey, Maynes & Breish Co.*, 1 N. L. R. B. 432; *Matter of National Motor Bearing Co.*, 5 N. L. R. B. 409. And only "net earnings" are deducted, allowance being made for the expense of getting new employment which, but for the discrimination, would not have been necessary. *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440.

Even though a strike is caused by an unfair labor practice the Board does not award back pay during the period of the strike. *Matter of Sunshine Hosiery Mills*, 1 N. L. R. B. 664. Employees who are discriminatorily discharged are treated as strikers if during a strike they refuse an unconditional offer of reinstatement. *Matter of Harter Corp.*, 8 N. L. R. B. 391. Originally back pay was ordered from the date of application for reinstatement. *Matter of Sunshine Hosiery Mills*, *supra*, but later orders have started back pay five days after application. *Matter of Tiny Town Togs*, 7 N. L. R. B. 54.

If there is unjustified delay in filing charges before the Board, a deduction is made for the period of the delay. *Matter of Inland Lime & Stone Co.*, 8 N. L. R. B. 944. Similar action is taken when a case is reopened after having been closed or withdrawn. *Matter of C. G. Conn, Ltd.*, 10 N. L. R. B. 493. And if the trial examiner rules in favor of the employer and the Board reverses the ruling, no back pay is ordered for the period when the examiner's ruling stood unreversed. *Matter of E. R. Haffelfinger Company*, 1 N. L. R. B. 760; and see the order in the present case.

The Board has refused to order any back pay where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract. *Matter of McKesson & Robbins, Inc.*, 19 N. L. R. B. No. 85.

If the business conditions would have caused the plant to be closed or personnel to be reduced, back pay is awarded only for the period which the worker would have worked in the absence of discrimination. *Matter of Ray Nichols, Inc.*, 15 N. L. R. B. 846. At times fluctuations in personnel so complicate the situation that a formula has to be devised for the distribution of a lump sum among the workers who have been discriminated against. *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727.

The rate of pay used in computing awards is generally that at the time of discrimination, but adjustments may be made for subsequent changes. *Matter of Lone Star Bag & Bagging Co.*, 8 N. L. R. B. 244; cf. *Matter of Acme Air Appliance Co.*, 10 N. L. R. B. 1385. Normal earnings in tips or bonuses have been taken into account. *Matter of Club Troika*, 2 N. L. R. B. 90; *Matter of Central Truck Lines*, 3 N. L. R. B. 317.

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ment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment.

But though the employer should be allowed to go to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings.

*Sixth.* Other minor objections to the Board's order were found without substance below. After careful consideration we agree with this disposition of these questions, and do not feel that further discussion is required.

The decree below should be modified in accordance with this opinion, remanding to the Board the two matters discussed under *Fourth* and *Fifth* herein, for the Board's determination of these issues.

*So ordered.*

Mr. Justice ROBERTS took no part in the consideration or disposition of the case.

A true copy.

• Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 387, 641.—OCTOBER TERM, 1940.

387                      vs.  
Phelps Dodge Corp., Petitioner,  
National Labor Relations Board,  
  
National Labor Relations Board.  
Petitioner,  
641                      vs.  
Phelps Dodge Corporation.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Second Circuit.

[April 28, 1941.]

Mr. Justice MURPHY.

While I fully approve the disposition of the first three issues in the opinion just announced, I cannot assent to the modification of that part of the Board's order which required reinstatement of certain employees, or to the limitation imposed on the Board's power to make back pay awards.

First. The Board is now directed to reconsider its order of reinstatement merely because, in the course of its recital, it stated that even if the employees in question had secured other substantially equivalent employment it would nevertheless order their reinstatement for the reasons set forth in *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727.<sup>1</sup> There is neither claim nor evidence that reinstatement will not effectuate the policies of the Act. There is no suggestion that the order the Board issued was wrong or beyond its power. That order is challenged only because the statement and reference to the *Eagle-Picher* case are said to demonstrate that the Board ordered reinstatement mechanically due to a misconception of its functions under the

<sup>1</sup> The entire paragraph in which this statement appears reads: "We have found that the respondent has discriminated in regard to hire and tenure of employment of certain individuals named above. In accordance with our usual practice we shall order the reinstatement or the reemployment of such individuals. The respondent contends that the Board lacks power to order the reinstatement of any striker who has obtained other regular and substantially equivalent employment. We have found that none of the strikers discriminated against has obtained other regular and substantially equivalent em-

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statute, and that it did not consider whether reinstatement would effectuate the policies of the Act.

Even if it be assumed that this recital imports an inaccurate appraisal of the Board's power, an assumption which I believe is without justification, modification of its order is not a necessary consequence. The question before us is whether the order the Board issued was within its power. There is no occasion now to determine what disposition should be made of an order which was not an exercise of the Board's administrative discretion, or to infer that the Board must investigate the substantial equivalency of other employment before it may order reinstatement. Suffice to say, the Board found that certain employees had been the objects of unfair labor practices and that it would effectuate the policies of the Act to order their reinstatement. It expressly rested its order upon those findings.

The circumstances occasioning the latter finding are convincing evidence that the Board not only was required to but did exercise discretion in the formulation of its order of reinstatement. Throughout the hearing the employer's counsel sought to show by cross examining them that the complaining employees were not entitled to reinstatement. Shortly after that examination commenced, the trial examiner requested the Board's attorney to state the theory upon which he contended that those employees should be reinstated. Considerable testimony was offered to show the working conditions, hours, rates of pay, continuity of operation, etc., of mines in which the witnesses had secured other employment.

All this was in the record certified to the Board. Accompanying it was the contention of the employer that reinstatement should be denied for various reasons. The Board explicitly considered the contention, among others, that reinstatement would provoke fur-

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ployment within the meaning of the Act. Nevertheless, even if any striker had obtained such employment, we would, for the reasons set forth in *Matter of Eagle-Picher Mining & Smelting Co.*, still order reinstatement by the respondent."

It is to be noted, of course, that in the *Eagle-Picher* case the Board's remarks were made in answer to the argument advanced here, that § 2(3) narrows the application of the term "employees" in § 10(c).

It is worth noting, too, that in that case the Board stated: "Further to effectuate the purposes and policies of the Act, and as a means of removing and avoiding the consequences of the respondents' unfair labor practices, we shall, in aid of our cease and desist order, order the respondents to take certain affirmative action, more particularly described below." 16 N. L. R. B. 727, 831.

ther disputes and discord among the employees rather than promote labor peace. It also considered the contention that many of the employees had obtained other substantially equivalent employment, making both general and specific findings concerning it.<sup>2</sup> Finally, it concluded that the policies of the Act would be effectuated by ordering the employer to tender reinstatement to designated employees.

That its order of reinstatement was more than a perfunctory exercise of power is pointedly manifest from the Board's own statements. Answering the employer's contention that reinstatement might foster discord among the employees, the Board declared: "We cannot but consider the difficulties of adjustment envisaged in the foregoing testimony [upon which the employer relied] as conjectural and insubstantial, especially in view of the lapse of time since the strike. However, even assuming that the asserted resentment of non-strikers towards strikers and picketers persists, *the effectuation of the policies of the Act patently requires*<sup>3</sup> the restoration of the strikers and picketers to their status quo before the discrimination against them."

In discussing its proposed order, the Board said: "Having found that the respondent has engaged in unfair labor practices, we will order it to cease and desist therefrom and to take certain affirmative action *designed to effectuate the policies of the Act*<sup>4</sup> and to restore as nearly as possible the condition which existed prior to the commission of the unfair labor practices."

And in its formal order, the Board stated: "Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Phelps Dodge Corporation . . . shall: . . . 2. Take the following affirmative action *which the Board finds will effectuate the policies of the Act*:<sup>5</sup> (a) Offer to the following persons immediate and full reinstatement to their former or substantially equivalent positions

<sup>2</sup> The Board found that none of the employees had obtained other substantially equivalent employment. The Circuit Court of Appeals reversed this finding in part. The reversal is not challenged here, but that is immaterial since the Court now decides that the Board has the power to order reinstatement even though the employees have found other substantially equivalent employment, provided that the policies of the Act will be effectuated.

<sup>3</sup> Emphasis added.

<sup>4</sup> Emphasis added.

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. . . ; (b) Make whole [the following employees] for any loss of pay they may have suffered by reason of the respondent's discriminatory refusal to reinstate them . . . less the net earnings of each . . . ."

The italicized phrases in these quotations were not chance or formal recitals. They expressed in summary a considered exercise of administrative discretion. The Board carefully followed the precise procedure which this Court says it should have adopted. It found that the employees in question had been the victims of unfair labor practices. It also found that the policies of the Act would be effectuated by ordering their reinstatement. Since there was evidence to support these findings, it is difficult to understand what more the Board should or could have done.

But if we are now to consider in the abstract whether the Board properly opined that it might have the power to order reinstatement without regard to the substantial equivalency of other employment, I am nevertheless unable to approve the modification of its order, or to accept the inference that the Board must consider the substantial equivalency of other employment before it may order reinstatement. There is nothing in § 10(c) or in the Act as a whole which expressly or impliedly obligates the Board to consider the substantial equivalency of other employment or to make findings concerning it before it may order reinstatement. Indeed, such a rule narrows rather than broadens the administrative discretion which the Act confers on the Board.

Practical administrative experience may convince the Board that the self-interest of the employee is a far better gauge of the substantial equivalency of his other employment than any extended factual inquiry of its own. Conversely, the Board may conclude that the policies of the Act are best effectuated by an investigation in every case into the nature of his other employment. That choice of rules is an exercise of discretion which Congress has entrusted to the Board. Whichever rule the Board adopts, it does not follow that reinstatement becomes a remedy which is granted automatically upon a finding of unfair labor practices. If for other reasons the Board finds that the policies of the Act will not be effectuated, of course it not only could but should decline to order an offer of reinstatement. Compare *Matter of Thompson Cabinet Co.*, 11 N. L. R. B. 1106.

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<sup>5</sup> Emphasis added.

*Second.* As already indicated, I am unable to accept the limitation now imposed on the Board's power to make back pay awards. Again the question is simply this: Was the back pay order within the power of the Board and supported by evidence? What order the Board should have made or what rule of law it should have followed if some of the employees had "willfully incurred" losses are questions of importance which we should answer only when they are presented. They are not here now.

The Board expressly found that the policies of the Act would be effectuated by ordering the employer to make whole those employees who had been the victims of discriminatory practices. We are pointed to nothing which requires a different conclusion. We are not referred to any employee who "willfully incurred" losses, or to any evidence in the record compelling us to hold that any of them did. At most the record shows only that some of the employees obtained other employment—which was not substantially equivalent—and then voluntarily relinquished it. For all we know, the Board could have determined that this evidence did not establish "willfully incurred" losses. Plainly that was a permissible inference from the evidence, and this being so, there is no occasion now to decide what the Board should have done had it drawn some other inference.

But again, if we are now to rule on the abstract issue, I cannot agree that the power to make back pay awards must be fettered in the manner described in the opinion just announced. For if the Board has no choice but to accept the limitation now imposed, its administrative discretion is curbed by the very decision which purports to leave it untouched.

It must be conceded that nothing in the Act requires such a limitation in so many words. To be sure nothing in the Act requires a back pay award to be diminished by the amounts actually earned (compare *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7), but that should admonish us to hesitate before we introduce yet another modification which Congress has not seen fit to enact, especially when the two situations differ in many respects. It is not our function to read the Act as we think it should have been written, or to supplant a rule adopted by the Board with one which we believe is better. Our only office is to determine whether the rule chosen, tested in the light of statutory standards, was within the permissible range of the Board's discretion.

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The Board might properly conclude that the policies of the Act would best be effectuated by refusing to embark on the inquiry whether the employees had willfully incurred losses. Administrative difficulties engendered by a contrary rule would be infinite, particularly as the number of individuals involved in the dispute increased. Underlying the contrary rule is the supposition that the employee would purposely remain idle awaiting his back pay award. But that attributes to the employee an omniscience frequently not given to members of the legal profession. He must be able to determine that the employer actually has committed unfair labor practices; that the unfair labor practices affect commerce within the meaning of §§ 2(6) and 2(7); that the Board will take favorable action and make a back pay award; that the Circuit Court of Appeals will enforce that order in full; and that this Court finally will affirm if the case comes here.

This is not all. He must have capital sufficient to provide for himself and for any dependents while he awaits the back pay award, even though that may not come until several years later.<sup>6</sup> He must risk union disfavor by dividing his efforts between a labor dispute and a search for a new job. He must realize, although his natural suppositions are otherwise, that he will probably not endanger seniority rights or chance of reinstatement by accepting other employment. He must be able to decide when he has made sufficient efforts to secure other employment notwithstanding that he is not told whether he can or must accept any job no matter where it is or what type of employment, wages, hours, or working conditions.

At his peril he must determine all these things because conventional common law concepts and doctrines of damages, applicable in suits to enforce purely private rights, are to be imported into the National Labor Relations Act.

Having these considerations in mind, supplemented perhaps by others not available or suggested to us, the Board might well decide that the rule disapproved here would best effectuate the policies of the Act. I do not think we should substitute our judgment on this issue for that of the Board.

Accordingly, I would affirm the order of the Board in full.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in this opinion.

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<sup>6</sup> The labor dispute which gave rise to this proceeding occurred in 1935.

# SUPREME COURT OF THE UNITED STATES.

No. 387, 641.—OCTOBER TERM, 1940.

Phelps Dodge Corporation, Petitioner,  
387                      vs.

National Labor Relations Board.

National Labor Relations Board,  
Petitioner,

641                      vs.

Phelps Dodge Corporation.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Second Circuit.

[April 28, 1941.]

Mr. Justice STONE.

With two rulings of the Court's opinion the CHIEF Justice and I are unable to agree.

Congress has, we think, by the terms of the Act, excluded from the Board's power to reinstate wrongfully discharged employees, any authority to reinstate those who have "obtained any other regular and substantially equivalent employment". And we are not persuaded that Congress, by granting to the Board, by § 10(c) of the Act, authority "to take such affirmative action, including reinstatement of employees with or without back pay as will effectuate the policies of the Act", has also authorized it to order the employer to hire applicants for work who have never been in his employ or to compel him to give them "back pay" for any period whatever.

The authority of the Board to take affirmative action by way of reinstatement of employees is not to be read as conferring upon it power to take any measures, however drastic, which it conceives will effectuate the policies of the Act. We have held that the provision is remedial not punitive, *Commonwealth Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 235, 236; see also *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 267, 268, and that its purpose is to effectuate the policies of the Act by achieving the "remedial objectives which the Act sets forth" and "to restore and make whole employees who have

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been discharged in violation of the Act." *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7, 12. The Act itself has emphasized this purpose when, in including in the category of "employees" those who might not otherwise have been so included, it provided, § 2(3), that the term "employee" "shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment".

While the stated policy of a statute is an important factor in interpreting its command, we cannot ignore the words of the command in ascertaining its policy. In enlarging the category of "employees" to include wrongfully discharged employees and at the same time excluding from it those who have obtained "other regular and substantially equivalent employment", the Congress adopted a policy which it may well have thought would further the cause of industrial peace quite as much as the enforced employment of discharged employees where there was no occasion to compensate them for the loss of their employment. It is the policy of the Act and not the Board's policy which is to be effectuated, and in the face of so explicit a restriction of the definition of discharged employees to those who have not procured equivalent employment, we can only conclude that Congress has adopted the policy of restricting the authorized "reinstatement of employees" to that class.

Even if we read the language of § 2(3) distributively, it seems difficult to say that the specially granted power to reinstate employees, extends to those who, by definition, are not employees, and this is the more so when the effect of the definition is consonant with what appears to be the declared purpose of the reinstatement provision. Nor can it fairly be said that the definition of employees is of significance only for the purpose of determining the appropriate bargaining agency of the employees. There is no evidence in the statute itself or to be derived from its legislative history that the definition was not to be applied in the one case quite as much as in the other. Certainly the fact of substantially equivalent employment has as much bearing upon making the discharged employee whole as upon his right to participate in the choice of a bargaining representative, and no ground has been advanced for saying that it applies to one and not the other.

As a majority of the Court is of opinion that the Board does possess the power to order reinstatement even though the discharged employees had obtained other equivalent employment, we agree that the case should now be remanded to the Board for a determination of the question whether reinstatement here would further the policies of the Act.

We agree that petitioner's refusal to hire two applicants for jobs, because of their union membership, was an unfair labor practice within the meaning of § 8(3) of the Act, even though they had never been employees of the petitioner, and that under § 9(c) the Board was authorized to order petitioner to cease and desist from the practice and to take appropriate proceedings under § 10 to enforce its order. But it is quite another matter to say that Congress has also authorized the Board to order the employer to hire applicants for work who have never been in his employ and to compel him to give them "back pay."

The Congressional debates and committee reports give no hint that in enacting the National Labor Relations Act Congress or any member of it thought it was giving the Board a remedial power which few courts had ever assumed to exercise or had been thought to possess and we are unable to say that the words of the statute go so far. The authority given to the Board by § 10(c) is, as we have said, not an unrestricted power, and the grant is not to be read as though the words "including reinstatement of employees with or without back pay" were no part of the statute. None of the words of a statute are to be disregarded and it cannot be assumed that the introduction of the phrase in this one was without a purpose.

Undoubtedly the word "including" may preface an illustrative example of a general power already granted, *Helvering v. Morgans, Inc.*, 292 U. S. 121, 125, or it may serve to define that power or even enlarge it. Cf. *Montello Salt Co. v. Utah*, 221 U. S. 452, 462, *et seq.* Whether it is the one or another must be determined by the purpose of the Act, to be ascertained in the light of the context, the legislative history, and the subject matter to which the statute is to be applied.

In view of the traditional reluctance of courts to compel the performance of personal service contracts it seems at least doubtful whether an authority to the Board to take affirmative action could,

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without more, fairly be construed as permitting it to take a kind of affirmative action which had very generally been thought to be beyond the power of courts. This is the more so because the Board's orders were by § 10(c) made subject to review and modification of the courts without any specified restriction upon the exercise of that authority.

It is true that in *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548, this Court had held that upon contempt proceedings for violation of a decree enjoining coercive measures by the employer against his union employees, a court could properly direct that the contempt be purged on condition that the employer restore the status quo. But Congress in enacting the National Labor Relations Act took a step further by providing that the Board could order reinstatement of employees even though there had been no violation of any previous order of the Board or of a court. It thus removed the doubt which would otherwise have arisen by defining and, as we think, enlarging the Board's authority to take affirmative action so as to include the power to order "reinstatement" of employees. But an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed, and an authority to award "back pay" to reinstated employees, is not an authority to compel payment of wages to applicants for employment whom the employer was never bound to hire.

Authority for so unprecedented an exercise of power is not lightly to be inferred. In view of the use of the phrase "including reinstatement of employees", as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms.